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QUESTION PRESENTED

Whether the FCC's authority to "modify any requirement" of Section 203 of the Communications Act in "special circumstances or conditions" allows the FCC to exempt all carriers deemed to lack market power from statutory filed rate requirements that this Court has found are "utterly central" to the administration of the Act and rest on Congressional determination that maximum publicity of carrier rates is necessary to prevent discrimination, irrespective of the degree of competition?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

NOS. 93-356, 93-521

MCI TELECOMMUNICATIONS CORPORATION,
Petitioner,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Respondent.

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION,
Petitioners,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Respondent.

BRIEF FOR RESPONDENT AT&T

Respondent American Telephone and Telegraph Company ("AT&T")[1] submits this Brief in support of the decision below.

RELEVANT STATUTES

The provisions of Sections 201, 202, 203, 204, 205, 210, 211, 226, and 332 of the Communications Act of 1934, 47 U.S.C. §§ 201-05, 210-11, 226, 332; of Section 6 of the Interstate Commerce Act as it stood in 1934, 24 Stat. 380 (1887), as amended; and of the current versions of that section (49 U.S.C. §§ 10761, 10762) are reprinted in the statutory appendix to this brief.

STATEMENT OF THE CASE

This case presents another question under the statutory filed rate doctrine that applies to the Interstate Commerce Act and

[1]The statement required by Rule 29.1 appears at p. ii of AT&T's Brief in Opposition to the petitions for certiorari ("Cert. Opp.").

statutes modelled on it. In *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990), this Court held that the Interstate Commerce Commission ("ICC") could not use the broad statutory proscription against "unreasonable practices" to prevent a fraud when the agency action had the effect of authorizing carriers to charge, and customers to pay, unfiled rates. Notwithstanding the motor carriers' conceded lack of market power in *Maislin*, the Court concluded that the ICC's policy would both nullify the core provision of the Interstate Commerce Act and authorize the unequal rates that the Act was designed to prevent.

In this case, the Federal Communications Commission ("FCC") has asserted far broader, potentially unlimited, authority to exempt communications common carriers from the rate filing provisions of the Communications Act of 1934. In orders entered in 1992, the FCC purports to exempt all common carriers that have not been found to possess market power both from the statutory requirement that they "shall" file "all" their rates (47 U.S.C. § 203(a)) and from the statutory ban on charging select customers secret negotiated rates that are lower than the filed rates (*id*. § 203(c)). The FCC claims that its Section 203(b)(2) authority to "modify any requirement of this section in particular instances or by general order applicable to special circumstances or conditions" means that the FCC can exempt all carriers found to lack market power from all requirements of Section 203.

This issue arises in an unusual posture. During the first 49 years of the Communications Act, the FCC explicitly recognized that it had no authority to exempt carriers lacking market power from the core rate filing requirements of Section 203. Further, when the FCC first changed its position in the early 1980's, petitioner MCI argued, and the D.C. Circuit held, that the FCC lacked authority to revoke rate filing requirements for any carrier. *See MCI Telecommunications Corp.* v. *FCC*, 765 F.2d 1186 (D.C. Cir. 1985) (Cert. Opp. 1a). The FCC initially purported to acquiesce in that decision. However, after MCI thereafter itself began to provide selected large customers with secret unfiled discounts off its tariffed rates, the FCC entered orders in 1992 that sought

to authorize MCI to do so. In the decisions at issue here, the D.C. Circuit vacated those 1992 orders on the authority of its 1985 decision.

1. The Communications Act of 1934 and the FCC's Pre-1983 Positions. In Title II of the Communications Act of 1934, Congress established a comprehensive scheme to govern the provision of interstate communications services by telephone and telegraph common carriers. With exceptions not here relevant, these provisions were modelled on—and copied almost verbatim from—the provisions of the Interstate Commerce Act that then applied to railroads and that were extended to truckers in 1935.

Section 201 of the Communications Act requires that every common carrier provide service on reasonable request, and requires that all charges, classifications, practices, and regulations be just and reasonable. 47 U.S.C. § 201. Section 202 of the Act prohibits "unjust or unreasonable discrimination" in the charges, practices, classifications, or regulations for "like" communications services, and further makes it unlawful for any carrier to extend any preference or advantage to any person, class of persons, or locality. *Id*. § 202(a).

Section 203 contains what will be referred to in this Brief as "filed rate requirements." Section 203(a) provides that "[e]very common carrier . . . shall . . . file with the Commission and print and keep open for public inspection schedules showing all charges . . . and showing the classifications, practices, and regulations affecting such charges." *Id*. § 203(a). Section 203(c) correlatively provides that "no carrier, unless otherwise provided by or under authority of this chapter," shall provide services to any customer unless rate schedules are on file, and that no carrier shall charge a rate lower than or different from the charges specified in that schedule. *Id*. § 203(c).

Other provisions of the Act allow private, or public, challenges to the lawfulness of rates. Section 204 establishes a procedure for the FCC, "upon complaint" by a third party or on "its own initiative," to investigate the lawfulness of, and suspend, "any new or revised" tariff filing. *Id*. § 204. Section 205 authorizes the

FCC to determine that the charges set forth in the filed tariffs are not "just and reasonable," to prescribe the precise "just and reasonable charges to be hereafter observed," and to bar the carrier from thereafter publishing or collecting different rates. *Id.* § 205. Sections 206-209 establish a complaint process through which parties that learn of violations of the Act that cause them injury may seek redress from the FCC or federal courts. *See id.* §§ 206-209.

Other sections of the Act provide for penalties on carriers, or customers, for violations of these provisions (*see, e.g., id.* § 503) or authorize exemptions from the rate filing requirements for particular classes of carriers (*see, e.g., id.* § 332).

Prior to the early 1980's, the FCC consistently took the position that it had no authority to excuse any carrier from the filed rate requirements of Section 203. It held that it had no authority to permit one facilities-based long distance carrier with no market power (Western Union) not to file all its rates or to provide service at unfiled rates:

> There can be no question that tariffs are essential to the entire administrative scheme of the Act. They serve as a kind of "tripwire" enabling the Commission to monitor the activities of carriers subject to its jurisdiction and to thereby insure that the charges, practices, classifications, and regulations of those carriers are just, reasonable, and nondiscriminatory within the meaning of Sections 201 and 202 of the Act. The importance of tariffs and the requirement that common carriers—*all common carriers—must offer all of their communications services to the public through published tariffs* is well established. *See Armour Packing Company* v. *United States*, 209 U.S. 56 (1908).

Western Union Telegraph Co., 75 F.C.C.2d 461, 474 (1980) (emphasis added). The FCC similarly took the position that it had no authority to eliminate these requirements even for long distance carriers that do not own any facilities, but merely resell services of others:

> *The Commission has affirmative commands from Congress to ensure* that rates are just, reasonable and nondiscriminatory, Sections 201, 202; *that rates and practices are set forth in tariffs filed with the FCC, Section 203*; and that carriers obtain certificates of public convenience and necessity before obtaining facilities and putting them in operation, Section 214. [¶] *The agency has no authority to ignore these commands, even if market forces arguably are present which undercut the "natural monopoly" justification for regulation.*

AT&T v. *FCC*, 572 F.2d 17 (2d Cir. 1978), Brief of FCC, pp. 49-50 (emphasis added).

2. The *Competitive Carrier* Rulemaking. In 1979, the FCC instituted a rulemaking—known as *Competitive Carrier*[2]—to determine how it should exercise its regulatory authority over various categories of long distance carriers. In the initial stages of this rulemaking, the FCC concluded that it could reduce or eliminate its economic regulation of "nondominant carriers"—*i.e.*, carriers lacking market power. It therefore "streamline[d]" the rate filings of such carriers by allowing them to make their filings without cost support, on short notice, and in simplified formats.[3]

In the next stages, however, the FCC went beyond simply withdrawing from direct economic regulation. It adopted a policy under which it would "forbear" from itself requiring certain carriers to file their rates at all.[4] In adopting this policy, the FCC acknowledged that Section 203's filed rate requirement was "a means for this Commission to ensure the Act's objective of reasonable and not unjustly discriminatory rates."[5] However, the FCC stated that, in the case of carriers lacking market power, market forces should generally assure that rates are neither excessive nor unduly discriminatory and that the "fundamental

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[2]*See Policy and Rules Concerning Rates for Competitive Common Carrier Servs. and Facilities Authorizations Therefor* ("*Competitive Carrier*"), CC Docket No. 79-252, Notice of Inquiry and Proposed Rulemaking, 77 F.C.C.2d 308 (1979).

[3]*See Competitive Carrier*, First Report and Order, 85 F.C.C.2d 1, 33-37 (1980).

[4]*Competitive Carrier*, Further Notice of Proposed Rulemaking, 84 F.C.C.2d 445, 447 (1981) (proposing forbearance policy); *id.*, Second Report and Order, 91 F.C.C.2d 59, 65-67, 73-74 (1982) ("*Second Report*").

[5]*Second Report*, 91 F.C.C.2d at 71.

goals" of the Act would be better served by relieving carriers of their rate filing duties and relying on "carrier and customer complaints" to assure compliance with Sections 201(b) and 202(a). *Second Report*, 91 F.C.C.2d at 69-71. The forbearance policy was extended to virtually all long distance carriers except AT&T in the *Fourth Report* in this docket, 95 F.C.C.2d 554, 578-79 (1983).

No party appealed the *Second* or *Fourth Reports*. They neither imposed any obligation on any carrier nor restricted the rights of any person to pursue legal remedies if any carrier in fact failed to file all its rates. As the D.C. Circuit stated, nearly all carriers continued to file all their rates after the *Second* and *Fourth Reports* were issued. *MCI* v. *FCC*, 765 F.2d at 1189 (Cert. Opp. 5a).

However, in its *Sixth Report and Order*, 99 F.C.C.2d 1020 (1985), the FCC made detariffing mandatory for non-dominant carriers and prohibited them from filing tariffs. MCI petitioned for review of the *Sixth Report* in the Court of Appeals for the D.C. Circuit. Contrary to its representations here (*see* MCI Br. 9 n.13), MCI did not oppose the *Sixth Report* as "inconsistent with the flexibility the FCC's permissive detariffing rules were intended to promote."[6] MCI argued that both mandatory and permissive detariffing are unlawful for the same reason: "the only legal rates are those filed with the agency and . . . such filed rates must be used by carriers to conduct their business to the exclusion of unpublished customer-carrier contracts." *MCI* v. *FCC*, 765 F.2d 1186 (D.C. Cir. 1985), Brief of MCI, p. 10 (Apr. 1, 1985).[7] Indeed, MCI stated that, "[b]ecause the legal obligation to file tariffs is imposed directly upon the carrier pursuant to Section 203," even after the *Fourth Report* it had "no legal alternative" but to continue to file its rates, and the *Fourth Report* was a statement of the FCC's enforcement policies that had no effect on that obligation. *Id.*, p. 8.

[6]Indeed, in its brief in *AT&T* v. *FCC*, 978 F.2d 727 (D.C. Cir. 1992), MCI acknowledged that it had "argu[ed] not only against the mandatory detariffing required by the [*Sixth Report*] but also against the Commission's authority to allow permissive tariffing." *Id.*, Brief of MCI, p. 4 & n.9 (July 17, 1992).

[7]Ten copies of this brief have been lodged with the Clerk of the Court.

MCI's argument in that case directly contradicts its contentions here. MCI explained that Congress's "great purpose" in enacting both "the Interstate Commerce Act and the Communications Act" was "the prevention of unjust discrimination" and that "the carefully selected means by which this goal was to be obtained was the requirement that all common carriers have uniform schedules of rates and that those rates be posted and filed." *Id.*, pp. 23-24. MCI argued that a "clearer frustration of express Congressional purpose [than detariffing] is hard to imagine," because "[o]nly when tariffs are on file can members of the public . . . tell whether they . . . are being charged a carrier's uniform rate and, if not, can spot the preferential treatment they are entitled to complain about." *Id.*, pp. 24, 26-27. MCI also argued that detariffing would render meaningless the other provisions of Title II prohibiting rebates and granting the FCC the power to suspend filed rates. *Id.*, pp. 32-39.

3. The D.C. Circuit's Decision in *MCI* v. *FCC* and the FCC's Apparent Acquiescence. The D.C. Circuit agreed. It held that Section 203's requirements that "every" common carrier "shall" file "all" its rates (47 U.S.C. § 203(a)) and that "no" common carrier "shall" charge any rates other than those filed (*id.* § 203(c)) impose mandatory obligations on common carriers that the agency has no power to waive. *MCI* v. *FCC*, 765 F.2d at 1191-96 (Cert. Opp. 10a-20a). The court rejected the FCC's assertion that the FCC's Section 203(b)(2) power to "modify any requirement" of Section 203 in "particular instances" or "special circumstances" permitted it to "exempt" carriers from the statutory filed rate requirements or to "remove[ ] [these requirements] in gross by agency order." *MCI* v. *FCC*, 765 F.2d at 1191-93 (Cert. Opp. 10a-14a). The court stated that the FCC's view not only "depart[ed] from any plausible reading of the statute's text," but also was inconsistent with decisions of both the Court of Appeals for the Second Circuit and, until recently, the FCC itself. *See id.* at 1192-93 (Cert. Opp. 11a-14a).

Finally, the court stated that, in light of its interpretation of Section 203, the permissive detariffing policy of the FCC's *Fourth Report* could continue to stand, if at all, only as an exercise of

the agency's enforcement discretion rather than as a rule that purported to exempt any carriers from the statutory rate filing obligation. *MCI* v. *FCC*, 765 F.2d at 1190-91 n.4 (Cert. Opp. 8a-9a n.4). The FCC appeared to acquiesce in this ruling. In a brief filed in the D.C. Circuit later that same year, the FCC defended the lawfulness of its permissive detariffing policy on the ground that it was not a substantive rule that changed any "unalterable" tariff obligations, but merely a decision not to "enforce the tariff filing requirement of Section 203," and the FCC compared that decision to "a prosecutor's decision not to indict." *MCI* v. *FCC*, No. 84-1402 (D.C. Cir.), Brief of FCC, pp. 26-27 & n.42 (Dec. 26, 1985).

AT&T then took the same position.[8] Similarly, contrary to MCI's misstatements, AT&T has maintained throughout the period since *MCI* v. *FCC* was decided that rate filing requirements cannot be removed for any carrier (including AT&T), but that the FCC can, and should, streamline regulation of all long distance carriers.[9] In this regard, AT&T has argued that a policy of asymmetrical rate filing and other regulations for carriers in the

[8]Contrary to the misstatements of the FCC (Br. 7) and MCI (Br. 10-11), AT&T defended the FCC order on the same ground, stating that the FCC's forbearance policy "merely indicated that the Commission would not take enforcement action." *Id*., Brief of AT&T, p. 41 (Jan. 9, 1986).

[9]*See, e.g., Competition in the Interstate Interexchange Marketplace*, CC Docket No. 90-132, Reply Comments of AT&T, pp. 63-70, 81-82 (Sept. 18, 1990) (Section 203 requires AT&T and all interexchange carriers to file all rates; Section 203(b) permits the FCC to adopt shortened notice periods, to allow "contract tariffs" rather than traditional rate schedules, and to eliminate requirements of cost support, for all carriers in competitive markets). Similarly, in the 1985 Congressional testimony that MCI miscites (Br. 11), AT&T was discussing elimination of cost of service price regulation, not rate filings.

Finally, contrary to MCI's misstatement (Br. 16), AT&T's September 22, 1993 request to the FCC that it be reclassified as a "nondominant" carrier was *not* a request that it be excused from filing tariffs. AT&T made its request after the D.C. Circuit had invalidated permissive detariffing and had held that AT&T and other carriers must file tariffs, regardless of whether they are classified as "dominant" or "nondominant." AT&T's lack of market power does mean that, *so long as rates are filed and customers can determine all of the carrier's charges*, the purposes of Sections 201(b) and 202(a) can be met without price cap regulations and lengthy notice periods for rate filings.

competitive long distance services market is an economically unsound policy as well as unlawful.

4. The FCC's 1992 Orders and the Decisions Under Review. Notwithstanding its statements and successful arguments in 1985, MCI began in mid-1987 to violate Section 203 by providing services to its largest customers under secret, unfiled discounts off its tariffed rates. When it learned of this practice, AT&T filed a complaint with the FCC under Section 208 of the Communications Act, 47 U.S.C. § 208, challenging MCI's violation of its statutory obligations.

AT&T alleged that MCI was, for example, providing service to Merrill Lynch at rates at least 8.5% lower than the lowest rates specified in its tariffs, and to a large university under an unfiled contract that expressly stated that its "pricing will be based on a 5% discount applied to . . . the interstate tariff on file with the Federal Communications Commission." *AT&T* v. *MCI*, FCC File No. E-89-297, AT&T Complaint (filed Aug. 7, 1989). MCI admitted the factual allegations of AT&T's complaint, and defended its conduct as authorized by the *Fourth Report*.

The FCC dismissed AT&T's complaint by applying the "rule" of its *Fourth Report*. Contrary to its previous position that the permissive detariffing policy of the *Fourth Report* was simply an exercise of its enforcement discretion, the FCC stated that this policy was actually "a binding substantive rule" that had "removed" Section 203's rate filing requirement in the case of nondominant carriers. *AT&T Communications* v. *MCI Telecommunications Corp.*, 7 FCC Rcd. 807, 809 (1992).

The D.C. Circuit reversed. *AT&T* v. *FCC*, 978 F.2d 727 (D.C. Cir. 1992) (MCI Pet. 37a). Relying on *MCI* v. *FCC* and *Maislin*, the Court held that the FCC's forbearance rule was "plainly contrary to Section 203." *Id*. at 729 (MCI Pet. 39a). It concluded that "[w]hether detariffing is made mandatory, as in the *Sixth Report*, or simply permissive, as in the *Fourth Report*, carriers are, in either event, relieved of the obligation to file tariffs" and that "that step exceeds the limited authority granted the [FCC] in

Section 203(b) to 'modify' requirements of the Act" in special circumstances or conditions. *Id.* at 736 (MCI Pet. 53a).

During the pendency of that petition for review, the FCC conducted a new rulemaking to reexamine the lawfulness of its forbearance policy. In its Order in that proceeding, which was released shortly after the decision in *AT&T* v. *FCC*, the FCC reiterated its position that Section 203(b)(2) granted it authority to remove the statutory "tariff filing requirements of both subsections (a) and (c) of Section 203." MCI Pet. 14a. The FCC also concluded that Congress had "acquiesced" in this interpretation by failing to enact legislation disapproving it (*id.* at 22a-25a), and it made a series of "findings" that its permissive detariffing rule has benefited competition in the long distance market—all of which AT&T disputes.[10]

The FCC's exemption from Section 203 applies to all carriers not previously declared to have market power and thus to be dominant. This category includes not only virtually all interexchange carriers other than AT&T but also the emerging

[10]The FCC's findings do not withstand even cursory analysis. For example, the FCC's attempt to attribute the dramatic post-January 1, 1984 reduction in AT&T's long distance market share, and the flood of long distance entry, to the permissive detariffing rules is preposterous (MCI Pet. 29a-30a); these are products of AT&T's January 1, 1984 divestiture of the Bell Operating Companies, which assured that all long distance carriers enjoyed the same access to local bottleneck facilities that AT&T alone had formerly enjoyed. The suggestion that tariff regulation requires costly, economic regulation of carriers is meritless (*id.* at 27a); rate filing can be the equivalent of little more than postcards (*see* p. 24 n.33, *infra*). Similarly, the suggestion that these rules have been fashioned to prevent "price signalling" and exchange of price information in the competitive long distance market defies analysis (MCI Pet. 27a) in that AT&T is required to file tariffs, and that MCI, Sprint, and other long distance carriers are permitted to do so. AT&T has demonstrated at length in other contexts that the asymmetrical imposition of rate filing requirements in the competitive long distance market creates the worst of all worlds. Indeed, as the D.C. Circuit has found, the asymmetry allows AT&T's competitors to match AT&T's prices, but not vice versa, and has enabled MCI, Sprint, and others to abuse the regulatory process to harm competition by challenging each of AT&T's competitive tariffs. *MCI Telecommunications Corp.* v. *FCC*, 917 F.2d 30, 35 & n.2 (D.C. Cir. 1990); *see Regular Common Carrier Conf.* v. *United States*, 793 F.2d 376, 379 (D.C. Cir. 1986).

competitive access providers ("CAPs") that compete with local exchange carriers (such as the Bell Operating Companies) in providing the interstate "access" services that long distance carriers use to connect their networks to homes and businesses.

On June 4, 1993, the D.C. Circuit granted AT&T's motion for summary reversal of the FCC's decision. Without addressing the asserted "policy" benefits of "permissive detariffing," the D.C. Circuit held that "[t]he decision of this court in *American Tel. & Tel. Co.* v. *FCC*, 978 F.2d 727 (D.C. Cir. 1992) conclusively determined that the FCC's authorization of permissive detariffing violates Section 203(a) of the Communications Act." MCI Pet. 2a. MCI and the FCC petitioned for certiorari, and on November 29, 1993, this Court granted the petitions and ordered them consolidated. 114 S. Ct. 543.[11]

SUMMARY OF ARGUMENT

The D.C. Circuit's decision is correct for three reasons. First, the terms of the Communications Act are not susceptible to an interpretation in which the FCC can use its authority under Section 203(b)(2) to exempt any carrier from the core requirements that each file all its rates (Section 203(a)) and that each charge only filed rates (Section 203(c)).

Section 203(b)(2) allows "modif[ications]" of Section 203's requirements—*i.e.*, changes in the time, form, content, or place of required rate filings—not exemptions. Further, the terms of Section 203(c) indicate that exemptions from rate filing requirements can arise only from other provisions of the "chapter" (*e.g.*, Sec-

[11]After the D.C. Circuit vacated its permissive detariffing policy, the FCC issued yet another rulemaking decision on the subject. In this decision, it held that nondominant carriers, although required to file tariffs under the Court of Appeals' decisions, need not specify their rates in their tariffs. Instead, the FCC concluded it would be sufficient if such carriers filed ranges within which their rates would fall. *Tariff Filing Requirements for Nondominant Common Carriers*, 8 FCC Rcd. 6752, 6759 (1993). AT&T petitioned for review of that decision, and the D.C. Circuit has ordered expedited briefing and argument (Consol. No. 93-1562).

tion 332's authorization of exemptions for mobile carriers). In all events, the FCC's interpretation of Section 203(b)(2) is foreclosed by the numerous other provisions of the Act which presuppose that rates are filed and which the FCC has no authority to modify. In this regard, the provision of the Interstate Commerce Act (Section 6(3)) on which Section 203(b)(2) was based has uniformly been construed for over eighty years to reject the FCC's current claim.

Second, the FCC's interpretation of Section 203(b)(2) would have to be rejected even if the language of the Act were ambiguous. The century of decisions of this Court that culminated in the 1990 decision in *Maislin* establishes that the statutory rate publication requirements—and the ban on secret rates—are the fundamental means of achieving the statutory purposes of equal and reasonable rates, whatever the extent of competition. This Court has thus consistently held that even facially applicable provisions of the law cannot be construed to authorize exemptions from these requirements unless Congress has explicitly so provided—as it did in Section 332 of the Act for one category of carriers and as it has done in other statutes as well.

Third, petitioners' own arguments establish that Congress has ratified the D.C. Circuit's interpretation of Section 203(b)(2). Petitioners seek to distinguish *Maislin* on the ground that Congress amended the Interstate Commerce Act to allow the ICC to exempt one category of carriers (motor *contract* carriers) from filed rate requirements, thus " 'demonstrating that Congress is aware of the requirement and has deliberately chosen not to disturb it with respect to motor *common* carriers.' " Fed. Br. 29 (quoting *Maislin*, 497 U.S. at 135). That is no distinction. The situation here is identical. Congress responded to the D.C. Circuit decision in this case by refusing to adopt the broader amendments to the Communications Act that petitioners and their *amici* urged and by instead authorizing an exemption from filed rate requirements for only a narrow class of mobile radio carriers, again "demonstrating that Congress is aware of the requirement [in the Communications Act] and has deliberately chosen not to disturb it with respect to [any other] common carriers." *Id*.

ARGUMENT

Introduction

The FCC's Order would establish a broad, potentially unlimited, exemption from the statutory requirement that each common carrier file "all" its rates (47 U.S.C. § 203(a)) and charge only those rates that it has filed (*id*. § 203(c)). Today, the FCC's Order would remove these "filed rate" requirements for the domestic services offered by virtually all the nation's nearly 500 interexchange carriers (save AT&T). Further, by its terms, the Order would require removal of the requirements for AT&T's long distance services once the FCC finds (as AT&T contends) that AT&T too now lacks market power. Finally, the Order would also require removal of the filing requirements for the interstate access services of all local exchange carriers if and when these markets are deemed competitive (as the Bell Operating Companies contend that they already are or soon will be).

The D.C. Circuit correctly held that the FCC has no authority to effect these exemptions. This holding is compelled by the terms, structure, and purposes of the Communications Act. It is further compelled by a century of decisions of this Court that construed rate filing provisions modelled on the original Interstate Commerce Act ("ICA") and that establish a "filed rate doctrine" that "has been extended across the spectrum of regulated utilities." *Arkansas La. Gas Co.* v. *Hall*, 453 U.S. 571, 577 (1981).

These cases are especially pertinent. The terms of Section 203(a),[12]

[12]*Compare* 47 U.S.C. § 203(a) ("Every common carrier . . . shall . . . file with the Commission and print and keep open to public inspection schedules showing all charges . . . and showing the classifications, practices, and regulations affecting such charges") *with* 49 U.S.C. App. § 6(1) ("Every common carrier . . . shall file with the Commission . . . and print and keep open to public inspection schedules showing all the rates, fares, and charges . . . and the classification of freight . . . and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges").

(b),[13] and (c)[14] of the Communications Act of 1934—and, indeed, of virtually all the rest of Title II[15]—were copied almost verbatim from the then-existing provisions of the Interstate Commerce Act, with rare exceptions not here relevant.[16] Congress explicitly overruled the prior ICC decision that did not require telephone and telegraph carriers to file all their rates (*Unrepeated Message Case*, 44 I.C.C. 670, 674 (1917)), and adopted the same rate filing duties that Section 6 of the Interstate Commerce Act then imposed on railroads.[17] In this regard, the House and Senate Reports on the Bill confirmed that these provisions of the Communications Act were designed to achieve the same objective as the cognate provisions of the ICA.[18] The Reports fur-

[13]*Compare* 47 U.S.C. § 203(b) *with* 49 U.S.C. App. § 6(3) (quoted at p. 26, *infra*, and at Stat. App. 24a).

[14]*Compare* 47 U.S.C. § 203(c) *with* 49 U.S.C. App. § 6(7) (quoted at Stat. App. 25a).

[15]*Compare, e.g.*, 47 U.S.C. §§ 201(b), 202(a), 204, 205, 206, 207, 208, 209, 210 *with* 49 U.S.C. App. §§ 1(5) & 1(6), 2 & 3(1), 15(7), 15(1), 8, 9, 13(1) & 13(2), 16(1), 1(7). Ironically, two of MCI's former counsel (one of whom was a long-time member of MCI's Board of Directors) have demonstrated these points in detail. *See* Kenneth A. Cox & William J. Byrnes, *Title II: The Common Carrier Provisions—A Product of Evolutionary Development*, in *A Legislative History of the Communications Act of 1934*, pp. 25-60 (Max D. Paglin ed. 1989) ("*Paglin's Legislative History*") (summarizing the evolution of the ICA from 1887 to 1934 and the 73d Congress's use of the ICA as the basis for Title II).

[16]The one explicit exception is Section 221(b) of the Communications Act, which together with Section 2(b), 47 U.S.C. § 152(b), was written to deny the FCC the same ability to exercise jurisdiction over purely intrastate services that the courts had found the ICC to possess. *See Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 372-73 (1986).

[17]*See* 77 Cong. Rec. 10313 (1934) (statement of Rep. Sam Rayburn) ("Section 203, regarding the filing of schedules of charges, is based upon section 6 of the Interstate Commerce Act, which relates only to transportation. It is clear that the commission must have information as to charges made by the carriers if it is to regulate rates"); *see also* H.R. Rep. No. 1850, 73d Cong., 2d Sess. 4 (1934); 77 Cong. Rec. 8323 (1934) (statement of Sen. Dill).

[18]*See* S. Rep. No. 781, 73d Cong., 2d Sess. 2 (1934) ("In this bill many provisions are copied verbatim from the Interstate Commerce Act because they apply directly to communication companies doing a common carrier business, but in some paragraphs, the language is simplified and clarified. These variances

(Footnote continued on next page)

ther provide that one of the reasons the Communications Act adopted the ICA provisions was "to preserve the value of court and commission interpretations of that act."[19]

As explained in detail below, the century of decisions confirms what the terms, structure, and consistent prior interpretations of the Communications Act themselves establish: (1) Section 203(b)(2) is not susceptible to the interpretation the FCC urges (Part I, *infra*); (2) even if Section 203(b)(2)'s terms were ambiguous, Section 203(b)(2) would have to be construed narrowly so that it neither nullifies the provisions that are "utterly central" to the Act nor permits the discrimination that the Act sought to end (Part II, *infra*); and (3) Congress has ratified the D.C. Circuit and earlier Second Circuit interpretations of Section 203(b) (Part III, *infra*).

I. THE LANGUAGE AND STRUCTURE OF THE ACT DO NOT PERMIT THE FCC TO ELIMINATE THE REQUIREMENT THAT ALL RATES BE FILED.

The D.C. Circuit correctly held that the FCC's interpretation of Section 203 "departs from any plausible reading of the statute's text." *MCI* v. *FCC*, 765 F.2d 1186, 1193 (D.C. Cir. 1985) (Cert. Opp. 14a) (Ginsburg, R.B., J.). The terms and structure of the Communications Act—and the history of the cognate provisions of the ICA—make it explicit that Section 203(b)(2) is simply not "susceptible" to a reading in which the FCC can exempt any carrier from the Section 203 requirement that it file all its charges. *AT&T* v. *FCC*, 978 F.2d at 735 (MCI Pet. 52a).

or departures from the text of the Interstate Commerce Act are made for the purpose of clarification in their application to communications, rather than as a manifestation of congressional intent to attain a different objective."); H.R. Rep. No. 1850, 73d Cong., 2d Sess. 2 (1934) (to same effect).

[19]H.R. Rep. No. 1850, 73d Cong., 2d Sess. 4 (1934); *see also* Hearings on S. 2910 Before the Sen. Comm. on Interstate Commerce, 73d Cong., 2d Sess. 32 (1934), *reprinted in Paglin's Legislative History*, p. 154.

A. The FCC's Interpretation Is Foreclosed by the Plain Terms of the Act and Its Structure.

First, the FCC's position is foreclosed by the plain terms of Section 203. In pertinent part, Section 203 provides as follows (emphasis added):

> (a) *Every common carrier . . . shall . . . file* with the Commission and print and keep open for public inspection *schedules showing all charges* for itself and its connecting carriers for interstate and foreign wire or radio communication . . . *and showing the classifications, practices, and regulations affecting such charges* . . . .
>
> (b)(1) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after one hundred and twenty days notice to the Commission and to the public . . . .
>
> (2) *The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions* except that the Commission may not require the notice period specified in paragraph (1) to be more than one hundred and twenty days.
>
> (c) *No carrier*, unless otherwise provided by or under authority of this chapter, *shall engage or participate in such communication unless schedules have been filed* and published in accordance with the provisions of this chapter and with the regulations made thereunder; *and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication . . . than the charges specified in the schedule then in effect*, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

As the FCC concedes (Fed. Br. 17), Section 203(a) and 203(c) impose a mandatory obligation directly on each common carrier

to file "all" its charges. That the terms of Section 203(b)(2) do not allow *exemptions* of any carrier from this requirement is clear when Section 203(b)(2)'s terms are read in isolation, clearer when they are read in the context of Section 203 as a whole, and clearer still when considered in light of the central role of filed rates in the administration of other provisions of the Act that the FCC admittedly has no power to modify.

1. The FCC's Interpretation Violates the Plain Terms of Section 203(b)(2).

First, even when Section 203(b)(2)'s terms are read in isolation, they are not susceptible to the FCC's interpretation. Indeed, petitioners concede that the ordinary meaning of "modify" is not "eliminate," but "make minor changes in" and that this ordinary definition supports the D.C. Circuit's holding. *See* Fed. Br. 12, 19; MCI Br. 22.[20] However, they and their *amici* have located one dictionary (*Webster's Ninth New Collegiate Dictionary*, p. 763 (1988)) that defines "modify" to mean "make basic or fundamental changes in, often to give a new orientation to or serve a new end," including, in their view, exemptions. Fed. Br. 16, 17, 19; MCI Br. 21. On this basis, petitioners argue that this is a case in which there are "alternative dictionary definitions . . . each making some sense under the statute" and that the statute requires not only interpretation, but also deference to the FCC's current views. *See* Fed. Br. 35-36 & MCI Br. 21-22 (citing *National R.R. Passenger Corp.* v. *Boston and Maine Corp.*, 112 S. Ct. 1394, 1402 (1992)).

This claim is doubly wrong. First, there is no pertinent "alternative dictionary definition" that defines "modify" to mean "exempt," "revoke," or "eliminate." With the exception of *recent* editions of the *Webster's Collegiate Dictionary*, every dictionary of which AT&T is aware defines "modify" to mean changes that

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[20]The ordinary meaning of "to modify" is "to change somewhat the form or qualities of; alter partially; amend." *Random House Dictionary of the English Language*, p. 1236 (2d ed. 1987) (unabridged ed.). *Accord*, *Webster's Third New International Dictionary*, p. 1452 (1981) (unabridged ed.).

do not affect the essential features of a requirement.[21] Further, the language at issue in Section 203(b) of the Communications Act was first adopted as part of the ICA in 1906 (34 Stat. 586-87), and enacted in the Communications Act of 1934 (48 Stat. 1071), and the question here is what the term "modify" was understood to mean by the Congresses that enacted this language. At these relevant times, the then-current editions of even the *Webster's Collegiate Dictionary* did not contain the "alternative" definition on which petitioners now rely, but merely defined "modify" only as "change somewhat"[22]—as did other existing dictionaries.[23] In this regard, in 1933, this Court so held, stating that in their "usual meanings" the words "alter" and "modify" are not "equivalents of 'revoke.' " *Porter* v. *Commissioner*, 288 U.S. 436, 442 (1933). Thus, even if the word "modify" were viewed in isolation, its plain meaning would compel the D.C. Circuit's holding.

[21]*See* p. 17 n.20, *supra*. *See also The Oxford English Dictionary*, vol. ix, p. 952 (2d ed. 1989) ("to modify" is "[t]o make partial changes in; to change (an object) in respect of some of its qualities; to alter or vary without radical transformation"); *Ballentine's Law Dictionary*, p. 810 (3d ed. 1969) (distinguishing between the power to modify and the powers to create or abolish); *Black's Law Dictionary*, p. 1004 (6th ed. 1990) ("[t]o alter; to change in incidental or subordinate features; enlarge, extend; amend; limit, reduce"); *Webster's New Universal Unabridged Dictionary*, p. 1155 (2d ed. 1983) ("to limit or reduce slightly; to moderate"); *American Heritage Dictionary of the English Language*, p. 1161 (3d ed. 1992) (to same effect); *Webster's New World Dictionary*, p. 482 (2d concise ed. 1982) (same); *Webster's II New Riverside University Dictionary*, p. 762 (1988) (same).

[22]*See Webster's Collegiate Dictionary*, p. 628 (4th ed. 1934) ("[t]o limit or reduce in extent or degree" and "[t]o change somewhat in form or qualities; as, to *modify* a contract"); *id*., p. 628 (3d ed. 1930) (same); *id*., p. 642 (5th ed. 1947) (same). The first edition of this dictionary was published in 1898, and the definition to which petitioners allude was not added to the *Webster's Collegiate Dictionary* until the 7th Edition, which was first published in 1969.

[23]*See, e.g., Webster's New International Dictionary*, p. 1577 (2d ed. 1934) ("[t]o change somewhat the form or qualities of; to alter somewhat; as, to *modify* the terms of a contract"); *Webster's New International Dictionary*, pp. 1389-90 (1910) (to same effect); *Webster's International Dictionary of the English Language*, p. 935 (1903) (same); *Black's Law Dictionary*, p. 1198 (3d ed. 1933) (same), p. 787 (2d ed. 1910) (same), p. 783 (1891) (same); *see also Webster's American Dictionary of the English Language*, vol. ii (1828) (same).

Further, when the statutory term "modify" is read in the context in which it is used in Section 203(b)(2)—as it must be[24]—it is even clearer that Section 203(b) does not authorize exemptions from the filed rate requirements. Because Section 203(b)(2) only authorizes the FCC to "modify" a requirement of Section 203 "in particular instances" or in "special circumstances or conditions," it is patent that Section 203(b) authorizes, in the D.C. Circuit's words, only "circumscribed alterations—not, as the FCC would now have it, wholesale abandonment or elimination of a requirement" for any carrier that is deemed to lack market power.[25] *MCI* v. *FCC*, 765 F.2d at 1192 (Cert. Opp. 11a). That would allow the FCC to remove statutory filed rate requirements "in gross." *Id*. at 1193 (Cert. Opp. 14a).

2. The D.C. Circuit's Interpretation of Section 203(b) Is Supported by the Language of Section 203(c).

The D.C. Circuit's interpretation is also supported by the terms of Section 203(c). In particular, Section 203(c) supports what the plain meaning of Section 203(b) establishes: Section 203(b)(2) does not allow exemptions from statutory filed rate requirements, and exceptions can arise only from other provisions of the "chapter": *e.g.*, Section 332(c)(1)(A)'s authorizations of FCC exemptions for mobile carriers.

Section 203(c) provides that "unless otherwise provided by or under the authority of this chapter," no carrier shall provide communications services to any customer unless it has filed rate schedules and that no carrier shall charge any customer lower or different rates than those "specified" in "such schedules," either directly or through rebates, kickbacks, or any form of preference.

[24]Petitioners' proposed "alternative" interpretation of "modify" ignores that even a word with "many dictionary definitions . . . must draw its [statutory] meaning from its context" (*Ardestani* v. *INS*, 112 S. Ct. 515, 519 (1991)), and that a proposed "alternative" definition must make "some sense" in the statute before an ambiguity can be found. *Boston and Maine Corp.*, 112 S. Ct. at 1402.

[25]In this regard, as explained below, prior decisions otherwise make it explicit that the existence of competition, or a carrier's lack of market power, is not a circumstance or condition that permits an agency to exempt any carrier from the statutory filed rate requirements. *See* p. 26, *infra*.

MCI and the FCC claim that the "unless otherwise provided" phrase of Section 203(c) refers back to the "modification" authority of Section 203(b) (Fed. Br. 20-22; MCI Br. 23), and MCI claims that the language "makes clear" that Congress "contemplated" that the FCC could use its authority under Section 203(b) to "excuse carriers from statutory tariff obligations." MCI Br. 23.

That claim is meritless. It ignores the differences in wording between Section 203(b)(2) and Section 203(c). Whereas Section 203(b)(2) allows modifications to any requirement of this "section," Section 203(c) refers to exemptions from the requirements that arise from other provisions of the "chapter" (*i.e.*, all of the Communications Act). All Section 203(c) "makes clear" is that Congress understood that there are a number of other provisions of the Act that authorize (or allow the FCC to authorize) carriers to charge unfiled rates in narrowly defined circumstances, notwithstanding the filed rate requirements of Section 203.[26] Indeed, that Congress has enacted or authorized specific exceptions to the Section 203(c) requirement itself refutes any claim that the modification authority of Section 203(b) could have been intended to authorize exemptions from the requirements of Section 203(c).

3. The FCC's Interpretation Allows Modifications of Provisions of the Act That the FCC Has No Authority to Modify and Is Inconsistent with the Act's Structure.

In all events, the FCC's proposed interpretation of Section 203(b)(2) not only is foreclosed by numerous other provisions of the Communications Act, but also violates its very structure. Indeed, while the FCC claims a right to "modify any" requirement of Section 203, it does not, and could not, claim a right to modify other provisions of the Act. However, the existence of a filed rate is "utterly central" to numerous such other provisions

[26] *See, e.g.*, 47 U.S.C. §§ 201(b) & 211 (allowing services between carriers to be provided under contracts filed with the Commission); *id.* § 205 (requiring carrier to charge those rates the FCC "prescribes" as "just and reasonable," not filed rates); *id.* § 210 (allowing free service to employees or former employees); *id.* § 332(c)(1)(A) (authorizing the FCC to exempt mobile carriers from rate filing requirements).

of the Act (*Maislin*, 497 U.S. at 132), and the FCC's Order (and its claimed interpretation of Section 203(b)(2)) would not only modify, but in many instances nullify, other provisions of the Act that the FCC has no authority to change.

First, there are several provisions of the Act that are explicitly keyed to the filing of rates, or the existence of a filed rate. For example, the Section 415 right to recover "overcharges" (47 U.S.C. § 415) and the Section 204 right of a private party to file a complaint requesting, and the right of the FCC to order, suspension or investigation of a rate before it takes effect (*id.* § 204) presuppose that carriers have filed all their rates under Section 203(a). By removing rate filing obligations, the FCC is nullifying these other provisions of the Act. Indeed, *Maislin* discussed how "sanctioning adherence to unfiled rates" would undermine the basic structure of the ICA counterpart to Section 204. 497 U.S. at 132. "The [agency] cannot review in advance the reasonableness of *unfiled* rates." *Id.* (emphasis in original).

More fundamentally still, the FCC is authorizing the discrimination and preferences that are barred by another provision of the Act that the FCC concededly has no power to modify: Section 202(a). In this regard, petitioners are correct (*see* Fed. Br. 21; MCI Br. 23-24) that the FCC's interpretation of Section 203(b)(2) would mean that the FCC can (and has) exempted nondominant carriers that file tariffs (like MCI) from the Section 203(c) duty to follow their tariffs. These carriers would be exempted from Section 203(c)'s bans on secretly providing services to select customers at negotiated rates lower than existing filed rates, and on providing rebates, kickbacks, under-the-table payments or the like.[27] However, the FCC and MCI ignore that the conduct the FCC would authorize is not merely a violation of Section 203(c), but also constitutes the "very price discrimination" and preferences that Section 202(a) of the Act separately prohibits. *Maislin*,

[27] This exemption would also nullify the provision of Section 503 of the Act that provides for a "forfeiture" penalty of three times the amount of the rebate on any person who knowingly accepts "a rebate or offset against the regular charges for transmission of . . . messages as fixed by the schedules of charges provided for in this chapter." 47 U.S.C. § 503(a).

497 U.S. at 130. But the FCC has no authority to modify Section 202(a).

Finally, in addition to authorizing secret discounts, rebates, and kickbacks, the FCC's position otherwise effectively nullifies not only Section 202(a)'s unmodifiable ban on discrimination and preferences by any common carrier, but also Section 201's unmodifiable ban on "unjust or unreasonable" rates or practices by any common carrier. The FCC has not found—and could not find *ex ante*—that nondominant carriers will never violate these mandatory provisions. However, as the Court stated in *Maislin*, "[w]ithout [rate filing requirements] . . . it would be . . . virtually impossible for the public to assert its right to challenge the lawfulness of existing proposed rates." *Maislin*, 497 U.S. at 132. Indeed, the reality is that violations of Sections 201(b) and 202(a) will go undetected if all "charges" are not filed and if the FCC merely relies on private party "complaints" to unearth violations of these provisions.[28] Because the FCC concededly has no authority to authorize violations of these provisions, this further shows that the FCC's interpretation of its modification authority under Section 203 would change other provisions of the Act that the FCC has no authority to modify.

In short, the FCC's detariffing policy would nullify the suspension and investigation provisions of the Act, obviate the provision relating to overcharges, eviscerate the Act's reasonable rate and nondiscrimination requirements, eliminate the key tool for preventing secret rebates, eliminate the statutory triple forfeiture penalties, and, indeed, revolutionize the very structure of the Act for a vast, potentially unlimited, number of common carriers. Even if such authority could be constitutionally delegated,[29] this

[28]The FCC's assertion that tariffing is unnecessary because "discovery procedures are available to obtain pertinent information" (Fed. Br. 34) cannot be taken seriously. As this Court recognized in *Maislin*, where secret rates are being charged, "other [customers] cannot know if they should challenge a carrier's rates." 497 U.S. at 132.

[29]If the FCC were correct that Section 203(b)(2) allows it to revolutionize the basic structure of the Act, subject only to the FCC's own determination that

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Court has made it clear that an agency may not "administer the Act in a manner that is inconsistent with the administrative structure that Congress enacted into law." *ETSI Pipeline Project* v. *Missouri*, 484 U.S. 495, 517 (1988). *Accord*, *Dole* v. *United Steelworkers*, 494 U.S. 26, 42 (1990). These principles independently foreclose the FCC's proposed interpretation of Section 203(b)(2).[30]

4. The D.C. Circuit and Second Circuit Interpretations Allow Modifications of "*Any* Requirement" of Section 203.

It is for these reasons that each court of appeals to consider the issue—the Second Circuit in 1973 and 1978[31] and the D.C. Circuit in its 1985, 1992, and 1993 decisions at issue here—has held that the plain terms of the statute will not bear the interpretations that the FCC urges. Each has held that Section 203(b)(2) authorizes the FCC to modify the notice period and the form and contents of required rate schedules, but not the core requirement that all charges, and all classifications and practices affecting them, be filed. *See MCI* v. *FCC*, 765 F.2d at 1192-95 (Cert. Opp. 11a-19a).

"good cause" had been shown, serious questions would be raised about whether Congress may delegate such sweeping authority to an agency guided only by such a nebulous standard. *See Industrial Union Dep't, AFL-CIO* v. *American Petroleum Inst.*, 448 U.S. 607, 646 (1980) (plurality); *id.* at 685-88 (Rehnquist, J., concurring in the judgment). "A construction of the statute that avoids this kind of open-ended grant should certainly be favored." *Id.* at 646 (plurality).

[30]Petitioners' reliance on this Court's descriptions of the Communications Act as a "supple instrument" is misplaced. *See* Fed. Br. 38; MCI Br. 18, 24. Each such case cited by petitioners arose under not Title II, but Title III, and the principle, in any event, cannot be used to override explicit statutory limitations on the FCC's authority.

[31]*AT&T* v. *FCC*, 572 F.2d 17 (2d Cir. 1978); *AT&T* v. *FCC*, 487 F.2d 865 (2d Cir. 1973). The Second Circuit held that "[t]he Communications Act requires that common carriers . . . file their tariffs with the FCC, 47 U.S.C. § 203(a)" (*AT&T* v. *FCC*, 572 F.2d at 25), and that "under Section 203(b) the Commission may only modify requirements as to the form of, and the information contained in, tariffs and the [then] thirty days notice provision." *AT&T* v. *FCC*, 487 F.2d at 879.

Contrary to the FCC's claim (Br. 12, 18, 19), these holdings give full effect to Section 203(b)(2)'s provision that the FCC may "modify *any* requirement of [Section 203]." *See also* MCI Br. 21. At bottom, Section 203 imposes two requirements on every common carrier: (1) that each file schedules with the FCC showing "all" charges for itself, and all classifications, practices, and regulations affecting such charges,[32] and (2) that it do so on 120 days notice. Under the holdings of these circuits, the FCC can modify each of these requirements. First, the FCC can shorten, and has shortened, notice periods to as little as one day. Second, the FCC can alter, and has altered, the rate filing requirements themselves. It can alter the form and content of rate schedules (*e.g.*, by allowing the filing of customized or other contract tariffs and other alternatives to traditional rate schedules)[33] and can even alter the jurisdiction where they are filed by allowing rates for local facilities that are predominantly used for intrastate services to be filed at the states, rather than the FCC, unless and until the FCC issues preemptive orders.[34] Indeed, virtually all of MCI's, the FCC's,

[32]Section 203(c)'s ban on provision of service at secret unfiled rates is simply the flip side of the requirement that all charges be filed. If a firm violates Section 203(c) by providing service at secret unfiled rates, the violation exists because the carrier has not filed "all" its charges as required by Section 203(a).

[33]For example, the FCC (like the ICC before it) authorized AT&T (and other carriers) to develop customized and other service arrangements that are initially developed for a single customer. It allows these arrangements to be developed and filed either as traditional rate schedules (*see MCI* v. *FCC*, 917 F.2d 30 (D.C. Cir. 1990)) or filed as "contract tariffs" (*see Competition in the Interstate Interexchange Marketplace*, 5 FCC Rcd. 2627, 2642 (1990); *id.*, 6 FCC Rcd. 5880, 5897 (1991)). The FCC also can, and has, otherwise allowed carriers to file rates in whatever format was most convenient, without regard to requirements of the FCC regulations. *See* Public Notices, 8 FCC Rcd. 744 & 8 FCC Rcd. 3927 (1993). In all these cases, however, the *rates* are filed such that the FCC can assure that the charges are "just and reasonable" as required by Section 201(b) (*compare Federal Power Comm'n* v. *Texaco Inc.*, 417 U.S. 380 (1974)), and (2) the rates are known to all such that similarly situated customers can demand and receive equal rates as required by Section 202(a). *See MCI* v. *FCC*, 917 F.2d 30, 34-35 (D.C. Cir. 1990).

[34]Indeed, while rejecting the FCC's proposed interpretation of Section 203(b), the D.C. Circuit and the Second Circuit have each acknowledged the FCC's

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and their *amici's* purported policy arguments evaporate when these facts are acknowledged.[35]

Conversely, because the provisions of the statutory scheme all centrally depend on the filing and publication of "all" charges by "every" common carrier—and because, as explained below, *secret* rates are the very evil that the Act was designed to prevent—the plain terms of the Act foreclose the claim that Section 203(b)(2) authorizes the FCC to exempt carriers from the requirements that they publish and file "all" their rates, and charge only those rates that have been filed.

B. The Limited Scope of Section 203(b)(2) Is Confirmed by the Uniform Interpretations of the Cognate Provision of the Interstate Commerce Act.

That Section 203(b) does not confer the sweeping authority that petitioners claim is confirmed by the consistent interpretations of the cognate provision of the Interstate Commerce Act. In particular, Section 203(b)(2) was directly modelled on, and designed to achieve the same objectives as, Section 6(3) of the ICA. *See* p. 14 & nn.13,18, *supra*. As it stood in 1934 (and as it stood from 1906 until 1978), Section 6(3) stated in relevant part as follows:

authority to defer to state regulation in setting charges for purely local facilities that are primarily used for intrastate services, but are also jointly used to provide services that are interstate. *See Diamond International Corp.* v. *FCC*, 627 F.2d 489, 492-94 (D.C. Cir. 1980); *New York Telephone Co.* v. *FCC*, 631 F.2d 1059, 1065 (2d Cir. 1980). Here, too, the arrangements were consistent with the Act because the rates were filed and published—which enabled federal claimants, and the FCC, to monitor the rates and enabled the FCC to take preemptive action when the rates filed at the states were discriminatory or otherwise inconsistent with the Act. *See New York Telephone Co.*, 631 F.2d at 1067. Indeed, the FCC ultimately asserted exclusive jurisdiction over the jurisdictionally interstate aspects of facilities at issue in both *Diamond* and *New York Telephone*. *See* IBM Amicus Br. 7 n.9.

[35]These facts foreclose (1) IBM's claims that the D.C. Circuit holdings would disrupt state jurisdiction (*compare* IBM Amicus Br. 3-10 & 20-21 *with* p. 24 n.34, *supra*), (2) MCI's claims that rate filing requirements are incompatible with customized service requirements (*compare* MCI Br. 12 n.18 *with* p. 24, n.33, *supra*), and (3) the FCC's claims that rate filings are costly and burdensome. *Compare* MCI Pet. 27a, 29a *with* p. 24 n.33, *supra*.

> [T]he commission may, in its discretion and for good cause shown, . . . modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions . . . .

49 U.S.C. App. § 6(3).

Far from being understood to be "broad language" (Fed. Br. 16), the terms of Section 6(3) had been consistently construed by the ICC as allowing modifications of rate filing requirements only in cases of "actual emergency." *Acme Cement Plaster Co.* v. *St. Louis & San Fran. R.R.*, 22 I.C.C. 283, 285 (1912). And in contrast to the FCC's current claim, the ICC held that it had no authority to grant modifications or changes in the absence of "actual emergencies" even when competition existed that allegedly precluded carriers from charging supracompetitive rates. *See Changes in Schedules to Meet Water Competition*, 176 I.C.C. 217, 222-23 (1931). The ICC found this "restrictive" construction to be compelled both by the anti-discrimination provisions of the ICA and by the structure of the Act (*see, e.g., id.* at 220-21, 223-24), and shortly before the Communications Act was adopted, the ICC stated that it had "always"—indeed, more than 100,000 times—acted upon this understanding that the authority under Section 6(3) was limited and narrow. *Id.* at 222-23.

When Congress imported Section 6(3) into Section 203(b), it legislated in light of this settled understanding of the limited circumstances that can constitute "good cause" and "special circumstances or conditions." Indeed, one of the reasons for adopting the framework of the ICA was "to preserve the value of court and commission interpretation of that act." H.R. Rep. No. 1850, 73d Cong., 2d Sess. 4 (1934); *see also* pp. 14-15 nn.18-19, *supra*.

In any case, that this modification authority has never been understood to authorize exemptions from statutory filed rate requirements is confirmed both by the subsequent actions of Congress and by the uniform ICC and court decisions. In particular, one year after it enacted Section 203 of the Communications Act, Congress subjected both motor common carriers and motor contract carriers to the same mandatory rate filing requirements as railroads and telephone and telegraph carriers.[36] In each instance, Congress conferred the same "modification" authority on the ICC as it had previously granted in Section 6(3) and Section 203(b).[37] However, in the very same section where Congress conferred the *modification* authority, it also authorized the ICC to *exempt* motor *contract* carriers, but not motor common carriers, from rate filing requirements.[38] This is legislative recognition that the "modification" authority does not allow exemptions from rate filing requirements. *See Maislin*, 497 U.S. at 135; *Regular Common Carrier Conf.* v. *United States*, 793 F.2d 376, 379 (D.C. Cir. 1986).[39]

The point is further confirmed by the 1978 legislation that recodified the Interstate Commerce Act. Congress's objective was to consolidate the four separate parts of the Act (governing railroads, truckers, water carriers, and freight forwarders), and the statute expressly provided that it "may not be construed as making a substantive change in the laws replaced." Pub. L. No. 95-473, § 3(a), 92 Stat. 1466 (1978). In so recodifying, Congress placed the analogues of Section 203(a) and Section 203(b) (former ICA §§ 6(1) and 6(3)) into one section of the ICA (new § 10762), and placed the analogue of Section 203(c) (former ICA

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[36] *See* Motor Carrier Act of 1935 §§ 217 (common carriers), 218 (contract carriers), 49 U.S.C. App. §§ 317, 318.

[37] *See id.* §§ 217(c) & 218 (first proviso, fourth sentence), 49 U.S.C. App. §§ 317(c), 318.

[38] *See id.* § 218 (second proviso), 49 U.S.C. App. § 318.

[39] There is other evidence that Congress has never regarded the language of Section 203(b)(2) as affording federal agencies the power the FCC here asserts. For example, the Civil Aeronautics Board ("CAB") had the same "Section 6(3)" and "203(b)" authority to "modify" rate filing requirements as did the FCC and the ICC. *See* 49 U.S.C. § 1373(c) (1976) (amended by Pub. L. 95-504, § 22, 92 Stat. 1724). However, Congress plainly thought that power insufficient to accomplish detariffing, for in 1978, Congress granted the CAB the authority to "*exempt*" any person from these, and other, requirements of that statute. Airline Deregulation Act of 1978, Pub. L. 95-504, § 31, 92 Stat. 1731-32 (amending 49 U.S.C. § 1386(b)) (emphasis added); *see* S. Rep. No. 631, 95th Cong., 2d Sess. 85-86 (1978) (amendment "need[ed]" to provide "a flexible and broad exemption power").

§ 6(7)) into another section (new § 10761). The net effect is that the ICC's modification authority does not apply to either of the obligations covered by Section 203(c)'s analogue (former ICA § 6(7))—the obligation to file rate schedules in order to provide service and the obligation to adhere to those rates. Because this legislation was explicitly designed not to change the law, this Congressional Act confirms that neither original ICA Section 6(3) nor Section 203(b) of the Communications Act had been understood to confer the authority that the FCC now claims.

Subsequent decisions by both the D.C. Circuit and the ICC itself further confirm the narrow scope of this modification authority. First, the ICC has consistently adhered to the non-expansive view of the modification authority that the FCC now rejects. In 1985, for example, the ICC concluded that it did not have the authority to make optional the filing of certain rates, but that its modification authority allows only changes in the "technical steps of publishing, posting and filing, and does not extend to the general obligation of tariff filing." *International Joint Through Rates Involving Ocean Carriers*, 1 I.C.C.2d 978, 981-82 (1985). Because the 1978 recodification could not be construed as changing the law, the ICC relied on the ground that it had had no authority to modify core filing requirements under "the pre-recodification version of the Interstate Commerce Act." *Id*. The ICC reaffirmed this non-expansive interpretation of its modification authority in 1993, when it held that it had no authority to allow the filing of "tariffs" that do not specify "the per-unit rate" that each shipper pays. *Range Tariffs of All Motor Common Carriers*, ICC Nos. 40887 et al., 1993 MCC LEXIS 112 at *25 (Aug. 2, 1993).

Similarly, in *Regular Common Carrier Conference* v. *United States*, 793 F.2d 376 (D.C. Cir. 1986) (Scalia, J.), the court held that the ICA modification authority could not be used to authorize any carrier (there, a freight forwarder) to file tariffs containing merely its "average rates"—and determine the actual rate paid by each customer through negotiations and secret contracts. Because it is "utterly central" to the statute that the actual rate

paid by each customer be filed in, or ascertainable from, the carrier's tariffs, the court held that "what the Commission has done here goes beyond 'chang[ing] the . . . requirements of this section' " and could not be authorized by the modification provision of the Act. *Id*. at 379 (quoting 49 U.S.C. §10762(d)(1)). In so holding, the court noted that the modification provision appeared only in the counterpart to Section 203(a), but ultimately relied on the ground that the statutory provision authorizing exemptions for contract carriers establishes that the modification authority could not itself authorize exemptions of other carriers from the core rate filing requirement. *Id*.

In short, the FCC's proposed interpretation is foreclosed by the over 80 years of consistent interpretations by the ICC, Congress, and the courts of the cognate provision of the ICA on which Section 203(b) was based. Indeed, that the FCC itself was formerly emphatic in agreeing with the D.C. Circuit's and Second Circuit's interpretation (*see* pp. 4-5, *supra*) is further evidence that the language is susceptible to no other reading.

II. THIS COURT'S CONSISTENT DECISIONS FOR A CENTURY FORECLOSE THE FCC'S CLAIM THAT SECTION 203(b)(2) CAN BE CONSTRUED TO UPHOLD A DETARIFFING RULE.

Even if the terms of Section 203(b)(2) were ambiguous, a century of this Court's decisions establishes both that Section 203(b)(2) cannot be construed to authorize exemptions from statutory filed rate requirements and that the FCC cannot rely on competition or other "indirect" methods to ensure compliance with statutory requirements that rates be non-discriminatory and just and reasonable. These decisions establish that the rate publication requirement, and the ban on secret rates, are so fundamental to the statutory purposes that even general and facially applicable statutory provisions of law cannot be interpreted to authorize secret rates—unless these statutory provisions represent express Congressional exemptions from the statutory filed rate requirements. This is the holding of *Maislin* and its numerous precursors.

A. This Court's Filed Rate Decisions Establish That General or Ambiguous Provisions of Law, However Broad, Cannot Be Construed to Authorize Secret Rates, Irrespective of the Existence of Competition.

Nearly 100 years of decisions of this Court establish that exceptions to statutory filed rate requirements cannot be inferred or adopted from general or ambiguous statutory provisions of law, and that, in all events, the existence of competition cannot be relied upon to secure the objectives of the filing requirements. These holdings simply reflect the fact that the fundamental purpose of the ICA, and of the rate filing requirements of acts modelled on the ICA, was to secure *equal* as well as reasonable rates for all similarly situated customers by requiring "the fullest publicity" of carrier rates and practices, irrespective of the degree of competition in the industry. S. Rep. No. 46, Part I, 49th Cong., 1st Sess. 198 (1886) ("*Cullom Report*").

In this regard, it is ironic that petitioners repeatedly note that communications was a monopoly in 1934, but that long distance services are now competitive. *See, e.g.*, Fed. Br. 15; MCI Br. 22. Apart from misstating the 1934 conditions, petitioners ignore that the ICA was not designed merely to prevent uses of market power to charge excessive rates or to effect the kinds of price discrimination that violate the antitrust laws. The paramount purpose of the ICA was to prevent unequal rates among similarly situated customers, and Congress found that the prohibition against "unreasonable" discrimination in charges for like services cannot be enforced unless all individually negotiated rates are filed and similarly situated customers can thus know of, demand, and receive the same rates.[40] In this connection, Congress specifi-

[40]For example, customers who face different competitive conditions are not similarly situated, and rate differences that result solely from differences in "competitive conditions" do not constitute the "unreasonable discrimination" that the statute prohibits. *Sea-Land Services, Inc.* v. *ICC*, 738 F.2d 1311, 1317 (D.C. Cir. 1984); *see Eastern-Central Motor Carriers Ass'n* v. *United States*, 321 U.S. 194, 207-08 (1944). However, unless individually negotiated rates are filed, the similarly situated customers who face identical competitive conditions will not know of, and cannot demand, the same rate, and the statutory ban on discrimination would be violated. *Sea-Land*, 738 F.2d at 1316-19; *accord MCI* v. *FCC*, 917 F.2d 30, 38 (D.C. Cir. 1990).

cally concluded that, whereas monopolists have no reason to charge unequal rates to similarly situated customers, rate differences are "most conspicuous when and where competition is present." *Cullom Report*, p. 189. In short, the ICA rested on Congressional findings that whereas "competition [is] a safeguard against extortion" (*i.e.*, the excessive rates that are the evil of monopoly), "experience has shown that it [will be] no safeguard against [the] discrimination" that the ICA sought to prevent unless all rates are also filed. *Id.*, pp. 191–92; *see also id.*, pp. 187-90 & 198-208.

Thus, most of the industries that Congress has subjected to filed rate requirements, either in the ICA or in acts modelled on the ICA, are competitive. For example, in addition to the substantial long-haul railroad competition known to exist when the ICA was passed (*see* p. 30, *supra*), Congress was well aware that competition existed in the *telegraph* business when it passed the Communications Act in 1934.[41] Yet Title II of the Act nonetheless was applied to telegraph carriers no less than telephone companies. In addition, Congress has imposed the filed rate provisions that were originally developed for the railroad industry on the trucking, freight forwarding, commercial shipping,[42] and civil aviation industries,[43] in each case without respect to whether these industries could possibly be described as monopolies. It is thus incredible for the FCC now casually to contend that "competition" and "lack of market power" can constitute "special

[41]*See* Study of Communications by an Interdepartmental Committee, 73d Cong., 2d Sess., transmitted to the President, from the Secretary of Commerce, p. 11 (Jan. 23, 1934), *reprinted in Paglin's Legislative History*, p. 115; *see also MCI* v. *FCC*, 765 F.2d 1186 (D.C. Cir. 1985), Brief of MCI, pp. 43-44 & n.122 (discussing competition in the telephone and telegraph industries in 1934). At that time, the relative importance of telegraph service vis-a-vis long-distance telephone service was radically greater than it is now.

[42]Shipping Act of 1916, Act of Sept. 7, 1916, ch. 451, § 18, 39 Stat. 735, codified as amended at 46 U.S.C. § 817(a).

[43]Civil Aeronautics Act, Act of June 23, 1938, ch. 601, § 403, 52 Stat. 992-93 (formerly codified at 49 U.S.C. § 483); Federal Aviation Act of 1958, Pub. L. 85-726, § 403, 72 Stat. 758 (replacing Section 403 of the 1938 Act; formerly codified at 49 U.S.C. § 1373 and then repealed by Airline Deregulation Act of 1978, Pub. L. 95-504, § 1601, 92 Stat. 1745, which is itself codified in scattered sections of 49 U.S.C.).

circumstances" under Section 203(b)(2) of the Communications Act and allow the FCC to "exempt[ ]" carriers "from the tariff filing requirement." *See* Fed. Br. 32.

Indeed, for a century, this Court's decisions have emphasized that the requirement that all carriers file all their rates, and charge only filed rates, is the fundamental provision of the ICA and other statutes modelled on it, and that no provision of the Act can be construed to allow rates to be set by secret means. For example, in *Armour Packing Co.* v. *United States*, 209 U.S. 56 (1908), the Court emphatically held that the Act could not be construed to permit any carrier to set, or charge, rates by private unfiled contracts. The Court stated:

> If the rates are subject to secret alteration by special agreement, then the statute will fail of its purpose to establish a rate duly published, *known to all*, and from which neither shipper nor carrier may depart. [¶] It is said that if the carrier saw fit to change the published rate by contract, the effect will be to make the rate available to all shippers. But the law is not limited to giving equal rates by indirect and uncertain methods. It has provided for the establishing of one rate, to be filed as provided, subject to change as provided, and that rate to be, while in force, the only legal rate. *Any other construction of the statute opens the door to the possibility of the very abuses of unequal rates which it was the design of the statute to prohibit and punish.*

Id. at 81 (emphasis added).[44]

Because of the centrality of the rate filing requirements to Congress's purposes, the Court has consistently interpreted other provisions of law so as to preserve the integrity of the filed rate obligation. For example, in *Texas & Pacific Railway* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), the Court gave a narrow

[44]*Accord, Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry.*, 284 U.S. 370, 384 (1932); *Atchison, T. & S.F. Ry.* v. *Robinson*, 233 U.S. 173, 181 (1914); *Kansas City So. Ry.* v. *C.H. Albers Comm'n Co.*, 223 U.S. 573, 597 (1912); *Robinson* v. *Baltimore & O. R. Co.*, 222 U.S. 506, 508 (1912); *Southern Ry.* v. *Reid*, 222 U.S. 424, 438 (1912); *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 439 (1907); *New York, N.H. & H. R.R.* v. *ICC*, 200 U.S. 361, 391 (1906).

construction to the broad and facially applicable "savings" clause in the original ICA in order to assure that state court litigation could not alter, through settlements or even through judgments, the lawful rates duly filed with the ICC and produce the unequal rates that the Act sought to prevent. The Court explained that "there is not only a relation, but *an indissoluble unity* between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against undue preferences and discriminations." *Id.* at 440 (emphasis added).

Similarly, in *Keogh* v. *Chicago & Northwestern Railway*, 260 U.S. 156 (1922), the Court narrowly construed the facially applicable, and broad, provisions of Section 1 of the Sherman Act to assure that "[t]he legal rights of shipper as against carrier in respect to a rate [would continue to be] measured by the published tariff." *Id.* at 163. The Court held that "[t]his stringent rule prevails, because otherwise the paramount purpose of Congress—prevention of unjust discrimination—might be defeated." *Id.* In *Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986), the Court reaffirmed *Keogh* (over the objection of the United States), holding that "[i]f there is to be an overruling of the [filed rate doctrine], it must come from Congress rather than from this Court." *Id.* at 424; *see id.* at 417-24.[45]

[45]The FCC suggests (Br. 18) that an earlier case under the Natural Gas Act (*Permian Basin Area Rate Cases*, 390 U.S. 747, 786-87 (1968)) had established the contrary by upholding a Federal Power Commission decision that relieved small gas producers "from various ratefiling and reporting obligations." However, quite apart from the fact the Court was not construing an analogue to Section 203(b)(2), the filing obligations to which the Court referred arose under Sections 5 and 7 of the Natural Gas Act (15 U.S.C. §§ 717d, 717f), *not* the provision of Section 4 (15 U.S.C. § 717c) that contains statutory rate filing requirements. *Id.*

Further, in the subsequent decision in *FPC* v. *Texaco Inc.*, 417 U.S. 380 (1974), this Court rejected any such claim when it upheld the FPC's system of regulation of rates of small producers who are not common carriers and had no relevant nondiscrimination duty. The Court upheld the order *only because* those producers had no dealings with ultimate consumers and because their rates would be filed with the FPC and would be scrutinized as part of the costs of

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If there were any doubt that these settled understandings have continuing vitality, they were resolved by this Court's 1990 decision in *Maislin*. The Court there struck down an attempt by the Interstate Commerce Commission to avoid the "filed rate doctrine" through its statutory authority to proscribe "unreasonable practices." 49 U.S.C. § 10701. Specifically, the Court overturned the ICC's *Negotiated Rates* policy, which attempted to forbid a carrier to collect the filed rate after the carrier had previously negotiated a lower rate with a shipper, misled it into believing the negotiated rate had been filed, and then billed the shipper at that negotiated rate for months or even years. The ICC had justified this policy on the grounds that a narrow exception to the filed rate doctrine was needed to prevent a windfall to the carrier and that competition among motor carriers would prevent discrimination or unreasonable rates in this narrow circumstance.[46]

In *Maislin*, this Court did not deny that the ICC's power to regulate "unreasonable practices" is conferred in "language of the broadest scope" (*United States* v. *Baltimore & O. R.*, 333 U.S. 169, 175 (1948)) and that, viewed in isolation, it would justify the ICC's policy. Instead, *Maislin* examined the structure of the ICA as a whole and the many decisions of this Court construing it. 497 U.S. at 126-32 (citing cases). It concluded that "[t]he duty to file rates with the Commission, and the obligation to charge only

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service of pipelines (or large producers) with whom the small producers dealt. 417 U.S. at 390. Even then, however, the Court vacated the FPC's order to the extent that it might do what the FCC's Order at issue here in fact does: rely solely on market forces to assure that rates are "just and reasonable" under the statute. *Id.* at 399. Contrary to the FCC's suggestion (Br. 18), the Court held that no provision of the Natural Gas Act could be construed to "authorize the Commission to set at naught an explicit provision of the Act" and that "[n]o producer is exempt from § [ ] 4 [which includes the statutory rate filing requirement]." 417 U.S. at 394.

[46]497 U.S. at 121-22 & nn.3-4. *See NITL—Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 5 I.C.C.2d 623, 625 (1989) (in circumstances covered by *Negotiated Rates* policy, "rigid enforcement of the filed rate doctrine" would, among other things, "frustrate the national transportation policy of encouraging pricing innovation and competition, and would not be necessary to prevent discrimination").

those rates, have always been considered essential to preventing price discrimination and stabilizing rates." *Id.* at 126 (citations omitted). The Court further stated that to allow the carrier to charge a secret rate lower than the filed rate would constitute the very discrimination that the Act was designed to prevent. *Id.* at 130. The Court accordingly held that, whatever the ICC's "unreasonable practices" authority might encompass, it could not be interpreted by the ICC to enforce unfiled rates, because this would undermine requirements " 'utterly central' to the administration of the Act." *Id.* at 132 (quoting *Regular Common Carrier Conference*, 793 F.2d at 379). Significantly, the Court also rejected the claim that competition could justify exceptions to the filed rate requirements. *Id.* at 134-35.

Maislin compels the rejection of the FCC's interpretation of its Section 203(b)(2) "modification" authority. There, as here, a federal administrative agency sought to interpret one of its delegated powers to override the central rate filing obligations of the Act. This Court's conclusion that the obligations of the filed rate doctrine cannot be indirectly eliminated by declaring them "unreasonable practice[s]" necessarily means that the FCC cannot directly eliminate the filed rate requirements for virtually all long-distance carriers under putative "modification" authority.

Indeed, *Maistin* presented a far more compelling case for relaxation of the filed rate doctrine than does the present case. The "unreasonable practices" provision relied upon by the ICC in that case was a far broader and more open-ended source of administrative authority than the narrowly confined power to "modify" rate filing obligations "in particular instances or by general order applicable to special circumstances or conditions" at issue here. 47 U.S.C. § 203(b)(2). Moreover, the ICC in *Maislin* sought only to qualify the obligation of carriers to observe their filed rates in one narrow circumstance—where necessary to prevent fraud and a windfall. Here, in contrast, the FCC seeks to adopt a broad, and potentially unlimited, exemption from the basic requirement that carriers file all their rates and charge only filed rates.

In *Maislin*, moreover, all nine members of the Court agreed on the issue presented in this case: that the ICC could not generally

exempt any common carrier from its obligations to file all its rates and to charge only filed rates and that the carrier there had violated both these provisions by initially failing to file the negotiated rate and by thereafter initially failing to seek payment of the filed rate. *Compare* 497 U.S. at 126-136 (Opinion for the Court) *with id.* at 141-44 & n.6 (Stevens, J. dissenting). By contrast, the only point on which the dissent of Justice Stevens (joined by the Chief Justice) disagreed with the majority was whether a carrier's inequitable conduct of bringing a lawsuit to collect—and its recovery of—undercharges could be declared an "unreasonable practice," and thus unlawful, when the carrier had misled the shipper into believing that the negotiated rates had been filed. *See* 497 U.S. at 142 n.6 (Stevens, J., dissenting). This case involves no such inequitable conduct, but only the FCC's belief that the public interest would be served by a different regulatory scheme from the one adopted by Congress.

Further, *Maislin* and its precursors squarely foreclose all the grounds on which the FCC has sought to justify its "permissive detariffing" rule. As did the ICC's order in *Maislin*, the FCC's Order rests on the ground that the existence of competition, and a carrier's lack of market power, mean that the carrier will be unable to charge "unjust and unreasonable" rates (in violation of Section 201(b)) or "discriminatory" rates (in violation of Section 202(a)) and that the goals of the statute will be better served by other means. *See, e.g.*, MCI Pet. 26a-31a. But these arguments ignore that the statute does not allow the FCC to seek to achieve these ends by such "indirect and uncertain methods." *Armour Packing*, 209 U.S. at 81. In the Communications Act (as in the ICA), Congress has not merely prohibited "unreasonable" and "unequal" rates. It "also prescribed the manner in which that prohibition should be enforced": by requiring that each carrier file all its rates and charge only filed rates. *Robinson* v. *Baltimore & O. R. Co.*, 222 U.S. 506, 508 (1912). As this Court has more recently held, "[i]t is not the Court's [or the FCC's] role, however, to overturn congressional assumptions embedded into the framework of regulation established by the Act." *FPC* v. *Texaco*, 417 U.S. at 400.

Finally, *Maislin* forecloses petitioners' claim that this Court would have to defer to the FCC's interpretation of Section 203(b) if its terms were ambiguous (as they are not). *See* Fed. Br. 34-38 & MCI Br. 19-26 (citing *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837, 842-44 (1984)). In particular, *Maislin* squarely rejected the ICC's claims that *Chevron* required deference to the ICC's interpretation if its "construction [was] rational and consistent with the statute." *Maislin*, 497 U.S. at 130.

> We disagree. For a century, this Court has held that the Act, as it incorporates the filed rate doctrine, forbids as discriminatory the secret negotiation and collection of rates lower than the filed rate. . . . "[The Act] has provided for the establishing of one rate, to be filed as provided, subject to change as provided, and that rate to be while in force the only legal rate." . . . Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning.

Id. at 130-31 (quoting *Armour Packing*, 209 U.S. at 81). *See id.* at 136-38 (Scalia, J., concurring). *Accord*, *Lechmere, Inc.* v. *NLRB*, 112 S. Ct. 841, 847-48 (1992).[47]

B. There Is No Basis for Petitioners' Attempted Distinctions of *Maislin*.

Petitioners' attempts to distinguish *Maislin* are unavailing. First, petitioners note that *Maislin* was "decided under a different

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[47]Even if this were a case where ambiguity in the statute or lack of precedent required consideration of the agency's view, the FCC's interpretation of Section 203(b)(2) would not be entitled to deference. Foremost, the ICC does not share —and has rejected—the FCC's interpretation of the scope of the agencies' modification power. *See* pp. 26, 28, *supra*. Thus, to accept the FCC's interpretation, the Court would have to reject the longstanding ICC interpretation—or determine, at least implicitly, that both "diametrically opposite" interpretations are entitled to deference and thereby be "reduced to . . . total abdication in construing the statute." *Compare General Elec. Co.* v. *Gilbert*, 429 U.S. 125, 144-45 (1976); *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 522-23 n.12 (1982).

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statute (the Interstate Commerce Act rather than the Communications Act)." Fed. Br. 28; *see id.* at 27-29; MCI Br. 31-34. This contention is irrelevant to the question whether *Maislin* is controlling in the present context.

Petitioners do not question that Congress took the relevant language of Section 203 virtually verbatim from Section 6 of the ICA as it stood in 1934. *See* pp. 13-14, *supra*. As a general rule, language in one statute borrowed from even an unrelated earlier enactment will be construed the same way as the prior enactment (*see, e.g.*, *Morales* v. *TWA*, 112 S. Ct. 2031, 2037 (1992); *Communications Workers of Am.* v. *Beck*, 487 U.S. 735, 746-47 (1988)), and here Congress expressly intended the Communications Act to achieve the same goals as the ICA. *See* pp. 14-15 & nn.17-18, *supra*.[48] And this Court has held that statutes based on the ICA should be interpreted on the basis of precedents under the earlier Act. In *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U.S. 474 (1932), the Court was confronted with an issue under the Shipping Act of 1916, which "[i]n its general

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In this context, it is thus also pertinent that the FCC "has arrived at its fully expanded view of section 203(b)(2) rather lately." *MCI* v. *FCC*, 765 F.2d at 1192 (Cert. Opp. 13a). At least through 1980 the FCC "shared, indeed fostered, the judicial perception of the statutory tariff-filing requirement for common carriers" and understood that this requirement could not be "removed in gross by agency order." *Id.* at 1193 (Cert. Opp. 14a). The square conflict with the ICC's interpretation and inconsistency in the FCC's interpretation of its authority under Section 203(b)(2) means the FCC's current position can be afforded little deference. *Cf. INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987).

[48]When "Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978); *see also Keene Corp.* v. *United States*, 113 S. Ct. 2035, 2042-43 (1993); *Dewsnup* v. *Timm*, 112 S. Ct. 773, 779 (1992); *Pierce* v. *Underwood*, 487 U.S. 552, 567 (1988); *Midlantic Nat'l Bank* v. *New Jersey Dep't of Env. Protection*, 474 U.S. 494, 501 (1986). "That presumption is particularly appropriate" where, as here, Congress has "exhibited both a detailed knowledge of the [Act's] provisions and their judicial interpretations and a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation." *Lorillard*, 434 U.S. at 581; *see* p. 14 nn.16-18, *supra*.

scope and purpose, as well as in its terms, . . . closely parallels the Interstate Commerce Act." *Id.* at 481. The Court concluded:

> [W]e cannot escape the conclusion that Congress intended that the two acts, each in its own field, should have like interpretation, application and effect. It follows that the settled construction in respect of the earlier act must be applied to the later one, unless, in particular instances, there be something peculiar in the question under consideration, or dissimilarity in the terms of the act relating thereto, requiring a different conclusion.

Id. This principle is uniformly followed by federal courts.[49] It is controlling here, because whether or not the two statutes are otherwise " 'carbon cop[ies]' " (MCI Br. 33),[50] petitioners have not identified—and cannot identify—a single difference that is relevant to the issue before the Court.

Second, petitioners argue that *Maislin* did not consider the question of "the ICC's power to promulgate rules modifying tariff filing requirements under the ICA," and did not, by necessary

[49]*See, e.g.*, *Consolo* v. *Federal Maritime Comm'n*, 383 U.S. 607, 612 n.12 (1966); *MCI Telecommunications Corp.* v. *FCC*, 917 F.2d 30, 38 (D.C. Cir. 1990) ("The Communications Act, of course, was based on the ICA and must be read in conjunction with it."); *MCI Telecommunications Corp.* v. *Graham*, 7 F.3d 477, 479-80 (6th Cir. 1993) (same proposition); *ABC, Inc.* v. *FCC*, 643 F.2d 818, 821 (D.C. Cir. 1980) (same); *Diefenthal* v. *CAB*, 681 F.2d 1039, 1045 (5th Cir. 1982) (same proposition for Federal Aviation Act of 1958); *Towns of Concord, Norwood, and Wellesley* v. *FERC*, 955 F.2d 67, 70-71 (D.C. Cir. 1992) (same for particular provisions of Federal Power Act); *McCleneghan* v. *Union Stock Yards Co.*, 298 F.2d 659, 666 (8th Cir. 1962) (same for 1921 Packers and Stockyards Act).

[50]In this regard, MCI's reliance on *AT&T* v. *FCC*, 503 F.2d 612, 616 (2d Cir. 1974), is misplaced. It held only that the FCC could extend the statutory 30 day notice period because the Communications Act did not *then* contain the explicit prohibition of enlarging notice periods that was contained in the ICA. That difference has no pertinence to any issue in this case.

That is especially so because Congress thereafter amended Section 203(b) by making the notice period 120 days, by prohibiting the FCC from enlarging it, and by *not disturbing* the Second Circuit's holding (reaffirmed in that case) that Section 203(b) only allows changes in the form and contents of rate filings and the notice period. 90 Stat. 1080 (1976) (amending Section 203(b)); H.R. Rep. No. 1315, 94th Cong., 2d Sess. 13, 15, 18, 19 (discussing Second Circuit's holdings).

implication, reject the broad reading of the ICC's analogue to Section 203(b)(2) (today, Section 10762(d)). MCI Br. 32. Even if this were true,[51] it, too, would be irrelevant. None of the century of cases upon which *Maislin* stood had construed the scope of the ICC's authority to prohibit "unreasonable practices" under the counterpart to Section 201(b) of the Communications Act. But the prior decisions were nonetheless held to be controlling in *Maislin* in that they established that the requirements that all carriers file all their rates (under Section 203(a)'s analogue), and charge only filed rates (under Section 203(c)'s analogue), are so fundamental to the structure of the Act—and so central to assuring that rates are just, reasonable, and, in particular, non-discriminatory—that they can be altered only if Congress does so expressly. This holding forecloses the broad construction of Section 203(b)(2) of the Communications Act sought by petitioners, just as it foreclosed a broad construction of the ICA ban on unreasonable practices. *See* 497 U.S. at 130-36.

Petitioners thus miss the point in noting that the analogues of Section 203(a) and 203(b) are now located in a different section of the ICA (§ 10762) from the analogue to Section 203(c) (§ 10761). *See* Fed. Br. 28-29; MCI Br. 33. Even if this difference were otherwise germane to the issue *Maislin* resolved, it could not have the slightest significance to the issue before the Court. This "difference" between the two statutes did not arise until the ICA was recodified in 1978. No one disputes that the rate filing provisions of the ICA were identical in all material respects to those of the Communications Act *prior* to 1978. Petitioners are thus necessarily claiming that the ICC previously had the broad modification authority that the FCC now claims, but that Congress subtracted from this authority when it recodified the ICA in

[51]It is true that the ICC did not attempt to justify its *Negotiated Rates Policy* under its Section 10762(d) modification authority. However, the Court stated that Congress had only authorized exemptions from rate filing requirements for contract carriers and that any further exemptions must come from Congress (497 U.S. at 136), and the Court reserved decision on the question whether the modification authority even allowed the shortened notice periods and single customer tariffs that the D.C. Circuit's interpretation of Section 203(b)(2) allows. *Compare Maislin*, 497 U.S. at 134 n.14 *with* pp. 24-25 & n.33, *supra*.

1978. However, any such claim is baseless. The 1990 decision in *Maislin* relied on a century of pre-1978 decisions in rejecting the ICC's negotiated rates rule. Further, Congress explicitly provided in the 1978 recodification statute itself (not just the legislative history) that the recodification "may not be construed as making a substantive change in laws replaced." Pub. L. No. 95-473, § 3(a), 92 Stat. 1466 (1978).

Third, petitioners claim that *Maislin* involved a different issue from this case: "whether truckers must follow rates that have been filed," rather than whether they may be excused from filing tariffs at all. Fed. Br. 27-28; *see* MCI Br. 33. But that is wrong on both counts. First, as petitioners elsewhere admit (Fed. Br. 21; MCI Br. 23-24), the FCC Order exempts carriers from the obligation to follow their tariffs and allows them to charge rates that are lower than filed rates (as MCI has done). *See* pp. 9, 21, *supra*. Second, *Maislin* squarely held that the filing of tariffs (under § 10761) and following tariffs (under § 10762) are each "utterly central" to the administration of the Act. 497 U.S. at 132. The reality is that risks of the discrimination and unlawful rates that the Act is designed to prevent are exacerbated if a carrier files no rates, rather than selectively departs from those rates that it does file.

III. CONGRESS HAS RATIFIED THE D.C. CIRCUIT'S INTERPRETATION OF THE ACT AND IT IS TO CONGRESS THAT PETITIONERS MUST TURN.

Finally, despite the clear terms of Section 203 and the prior holdings that Section 203 imposes mandatory rate filing obligations that the FCC cannot waive, petitioners have offered elaborate arguments that Congress has acquiesced in the FCC's permissive detariffing rules. However, their own contentions show that Congress has, to the contrary, ratified the D.C. Circuit's and the Second Circuit's interpretation.

This much follows from the FCC's final attempt to distinguish *Maislin*. The FCC notes that "the Court in *Maislin* had relied on the amendment of the Interstate Commerce Act that had allowed

the ICC 'to exempt motor *contract* carriers from the requirements that they adhere to published tariffs' " and that the Court stated that this " 'demonstrat[es] that Congress is aware of the requirement and has deliberately chosen not to disturb it with respect to motor *common* carriers.' " Fed. Br. 29 (quoting *Maislin*, 497 U.S. at 135). But the FCC ignores that the D.C. Circuit's decision in this case has been similarly ratified.

In particular, as the FCC admits (Fed. Br. 26-27), petitioners and others responded to the D.C. Circuit's 1992 and 1993 decisions by proposing a series of amendments to the Communications Act. These ranged from proposals to give the FCC explicit authority to exempt nondominant carriers from rate filing requirements (*e.g.*, S. 1086, 103d Cong., 1st Sess., § 5, p. 13) to proposals that the FCC be allowed to exempt specific classes of carriers. As the FCC also admits, "Congress" responded by "stat-[ing] that it 'was aware . . . of the D.C. Circuit's' " decision, and by authorizing an exemption to statutory filed rate requirements only for one class of carriers: "mobile carriers." *See* Fed. Br. 26-27. As in *Maislin*, this establishes that Congress "has deliberately chosen not to disturb the [statutory rate filing obligation] with respect to [other] carriers." *Maislin*, 497 U.S. at 135.[52]

The FCC and MCI nonetheless also argue that Congress has acquiesced in the FCC's earlier permissive detariffing rule either by its silence or by enacting the Telephone Operator Consumer Services Improvement Act of 1991 ("TOCSIA"). This claim is baseless. "The doctrine of legislative acquiescence is at best only

[52]The FCC seeks to rely on this amendment by claiming that it and "the Commission's permissive detariffing policy are harmonious" and that the amendment "hardly shows congressional hostility toward the [FCC's] permissive detariffing policy." Fed. Br. 27. But *Maislin* rejected this precise argument in holding that vague emanations from the Motor Carrier Act of 1980 could not permit exceptions to the filed rate requirements:

> "[The FCC has] pointed to no specific statutory provision or legislative history indicating a specific congressional intention to overturn the longstanding . . . construction; harmony with the general legislative purpose is inadequate for that formidable task."

Maislin, 497 U.S. at 135 (quoting *Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. at 420).

an auxiliary tool for use in interpreting ambiguous statutory provisions." *Jones* v. *Liberty Glass Co.*, 332 U.S. 524, 533-34 (1947). Here, the statute—Section 203—is unambiguous, and Congress cannot silently "acquiesce" in an interpretation contrary to the statute's plain meaning. *Arkansas Best Corp.* v. *Commissioner*, 485 U.S. 212, 222 n.7 (1988); *SEC* v. *Sloan*, 436 U.S. 103, 121 (1978); *TVA* v. *Hill*, 437 U.S. 153, 173 (1978).

Further, throughout the period at issue, the only authoritative pronouncements in which Congress might have acquiesced were to the effect that filed rate requirements were mandatory and could not be, and had not been, waived by the FCC. The uniform existing judicial interpretation of Section 203 (the D.C. Circuit's 1985 and the Second Circuit's 1973 and 1978 decisions) held that the rate filing requirements were mandatory. Further, the FCC had then appeared to acquiesce in those decisions by characterizing its permissive detariffing rules as a statement of its enforcement policies that did not alter any carrier's "unalterable" duty under the statute. *See* pp. 7-8, *supra*. Indeed, while individual members of Congress were told (generally and in unrelated contexts) that the FCC was not engaged in economic regulation of nondominant carriers, they were never told that the FCC had purported to *remove* rate filing obligations. *Compare* Fed. Br. 23 & MCI Br. 27 n.27.

In any case, TOCSIA disclaims any intent or effect of changing the meaning of Section 203. It was enacted to address widespread complaints associated with a narrow segment of the industry (*viz.*, operator service providers). It thus specifically provides—in a section entitled "[s]tatutory construction" that neither the FCC nor MCI even mentions—that "[n]othing in this section shall be construed to alter the obligations, powers, or duties of common carriers or the Commission under the other sections of this chapter." 47 U.S.C. § 226(i). Because Section 203 is one of the "other sections of this chapter," TOCSIA cannot be read to alter the historic understanding of that section's mandatory rate filing requirements. Further, contrary to the FCC's tortured arguments

(Br. 22-26), TOCSIA's provisions are entirely consistent with the obligation of all common carriers to file tariffs.[53]

Finally, while the acquiescence arguments are meritless, petitioners are correct in looking to Congress for changes in the law. As this Court concluded in *Maislin*, if rate filing requirements no longer serve a valid purpose, "it is the responsibility of Congress to modify or eliminate these sections." *Maislin*, 497 U.S. at 136. That has been this Court's consistent teaching in this area, and Congress for its part has repeatedly shown that it is fully capable of legislating in the area, both to allow exemptions where appropriate[54] and to alter procedures and practices while reaffirming the core filed rate requirements.[55] Thus, "[i]f there is to be an overruling of the [filed rate requirements], it must come from Congress." *Square D Co.* v. *Niagara Frontier Tariff Bureau*, 476 U.S. 409, 424 (1986).

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[53]TOCSIA requires the filing of *additional* information that goes beyond that required by Section 203 (*e.g.*, amounts of commissions and estimates of traffic volumes) as well as rate information. *See* 47 U.S.C. § 226(h)(1). Thus, those common carriers that provide operator service (which include AT&T as well as many "nondominant" carriers) must file tariffs containing both the information required by Section 203 and the additional information required by TOCSIA while that statute remains in effect. TOCSIA also imposes filing obligations on providers of operator services that are not carriers and that are thus today not subject to Section 203 (*see id.* § 226(a)(9)), such that these noncarriers will make filings of only the information required by TOCSIA.

[54]*See, e.g.*, 47 U.S.C. § 332(c)(1)(A) (authorizing FCC to grant exemptions for commercial mobile carriers); 49 U.S.C. §§ 10761(b), 10762(f) (authorizing ICC to grant exemptions for motor contract carriers); Airline Deregulation Act of 1978, Pub. L. 95-504, § 31, 92 Stat. 1731-32 (amending 49 U.S.C. § 1386(b) to authorize CAB to grant exemptions from rate filing requirements).

[55]*See, e.g.*, Negotiated Rates Act of 1993, Pub. L. No. 103-180, § 2, 107 Stat. 2044 (reaffirming filed rate doctrine after *Maislin*, but amending law with regard to undercharge claims asserted by bankrupt carriers).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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STATUTORY APPENDIX

EXCERPTS FROM THE COMMUNICATIONS ACT OF 1934, AS AMENDED

47 U.S.C. § 201

§ 201. Service and charges

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided*, That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: *Provided further*, That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: *Provided further*, That nothing in this chapter or in any other provision of law shall prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such

common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

47 U.S.C. § 202

§ 202. Discrimination and preferences

(a) Charges, services, etc.

It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

(b) Charges or services included

Charges or services, whenever referred to in this chapter, include charges for, or services in connection with, the use of common carrier lines of communication, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind.

(c) Penalty

Any carrier who knowingly violates the provisions of this section shall forfeit to the United States the sum of $6,000 for each such offense and $300 for each and every day of the continuance of such offense.

47 U.S.C. § 203

§ 203. Schedules of charges

(a) Filing; public display

Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate,

file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b) Changes in schedule; discretion of Commission to modify requirements

(1) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after one hundred and twenty days notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe.

(2) The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than one hundred and twenty days.

(c) Overcharges and rebates

No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication

unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

(d) Rejection or refusal

The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(e) Penalty for violations

In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of $6,000 for each such offense, and $300 for each and every day of the continuance of such offense.

47 U.S.C. § 204

§ 204. Hearings on new charges; suspension pending hearing; refunds; duration of hearing; appeal of order concluding hearing

(a)(1) Whenever there is filed with the Commission any new or revised charge, classification, regulation, or practice, the Commission may either upon complaint or upon its own initiative without complaint, upon reasonable notice, enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission, upon delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such charge, classification, regulation, or practice, in whole or in part but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearing the Commission may make such order with reference thereto as would be proper in a proceeding initiated after such charge, classification, regulation, or practice had become effective. If the proceeding has not been concluded and an order made within the period of the suspension, the proposed new or revised charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed charge for a new service or a revised charge, the Commission may by order require the interested carrier or carriers to keep accurate account of all amounts received by reason of such charge for a new service or revised charge, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such charge for a new service or revised charges as by its decision shall be found not justified. At any hearing involving a new or revised charge, or a proposed new or revised charge, the burden of proof to show that the new or revised charge, or proposed charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

(2)(A) Except as provided in subparagraph (B), the Commission shall, with respect to any hearing under this section, issue an order concluding such hearing within 12 months after the date that the charge, classification, regulation, or practice subject to the hearing becomes effective, or within 15 months after such date if the hearing raises questions of fact of such extraordinary complexity that the questions cannot be resolved within 12 months.

(B) The Commission shall, with respect to any such hearing initiated prior to November 3, 1988, issue an order concluding the hearing not later than 12 months after November 3, 1988.

(C) Any order concluding a hearing under this section shall be a final order and may be appealed under section 402(a) of this title.

(b) Notwithstanding the provisions of subsection (a) of this section, the Commission may allow part of a charge, classification, regulation, or practice to go into effect, based upon a written showing by the carrier or carriers affected, and an opportunity for written comment thereon by affected persons, that such partial authorization is just, fair, and reasonable. Additionally, or in combination with a partial authorization, the Commission, upon a similar showing, may allow all or part of a charge, classification, regulation, or practice to go into effect on a temporary basis pending further order of the Commission. Authorizations of temporary new or increased charges may include an accounting order of the type provided for in subsection (a) of this section.

47 U.S.C. § 205

§ 205. Commission authorized to prescribe just and reasonable charges; penalties for violations

(a) Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order

that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

(b) Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of this section shall forfeit to the United States the sum of $12,000 for each offense. Every distinct violation shall be a separate offense, and in case of continuing violation each day shall be deemed a separate offense.

47 U.S.C. § 210

§ 210. Franks and passes; free service to governmental agencies in connection with national defense

(a) Nothing in this chapter or in any other provision of law shall be construed to prohibit common carriers from issuing or giving franks to, or exchanging franks with each other for the use of, their officers, agents, employees, and their families, or, subject to such rules as the Commission may prescribe, from issuing, giving, or exchanging franks and passes to or with other common carriers not subject to the provisions of this chapter, for the use of their officers, agents, employees, and their families. The term "employees", as used in this section, shall include furloughed, pensioned, and superannuated employees.

(b) Nothing in this chapter or in any other provision of law shall be construed to prohibit common carriers from rendering to any agency of the Government free service in connection with the preparation for the national defense: *Provided*, That such free service may be rendered only in accordance with such rules and regulations as the Commission may prescribe therefor.

47 U.S.C. § 211

§ 211. Contracts of carriers; filing with Commission

(a) Every carrier subject to this chapter shall file with the Commission copies of all contracts, agreements, or arrangements with other carriers, or with common carriers not subject to the provisions of this chapter, in relation to any traffic affected by the provisions of this chapter to which it may be a party.

(b) The Commission shall have authority to require the filing of any other contracts of any carrier, and shall also have authority to exempt any carrier from submitting copies of such minor contracts as the Commission may determine.

47 U.S.C. § 226

§ 226. Telephone operator services

(a) Definitions

As used in this section—

(1) The term "access code" means a sequence of numbers that, when dialed, connect the caller to the provider of operator services associated with that sequence.

(2) The term "aggregator" means any person that, in the ordinary course of its operations, makes telephones available to the public or to transient users of its premises, for interstate telephone calls using a provider of operator services.

(3) The term "call splashing" means the transfer of a telephone call from one provider of operator services to another such provider in such a manner that the subsequent provider is unable or unwilling to determine the location of the origination of the call and, because of such inability or unwillingness, is prevented from billing the call on the basis of such location.

(4) The term "consumer" means a person initiating any interstate telephone call using operator services.

(5) The term "equal access" has the meaning given that term in Appendix B of the Modification of Final Judgment entered August 24, 1982, in United States v. Western Electric, Civil Action No. 82-0192 (United States District Court, District of Columbia), as amended by the Court in its orders issued prior to the enactment of this section.

(6) The term "equal access code" means an access code that allows the public to obtain an equal access connection to the carrier associated with that code.

(7) The term "operator services" means any interstate telecommunications service initiated from an aggregator location that includes, as a component, any automatic or live assistance to a consumer to arrange for billing or completion, or both, of an interstate telephone call through a method other than—

(A) automatic completion with billing to the telephone from which the call originated; or

(B) completion through an access code used by the consumer, with billing to an account previously established with the carrier by the consumer.

(8) The term "presubscribed provider of operator services" means the interstate provider of operator services to which the consumer is connected when the consumer places a call using a provider of operator services without dialing an access code.

(9) The term "provider of operator services" means any common carrier that provides operator services or any other person determined by the Commission to be providing operator services.

(b) Requirements for providers of operator services

(1) In general

Beginning not later than 90 days after October 17, 1990, each provider of operator services shall, at a minimum—

(A) identify itself, audibly and distinctly, to the consumer at the beginning of each telephone call and before the consumer incurs any charge for the call;

(B) permit the consumer to terminate the telephone call at no charge before the call is connected;

(C) disclose immediately to the consumer, upon request and at no charge to the consumer—

(i) a quote of its rates or charges for the call;

(ii) the methods by which such rates or charges will be collected; and

(iii) the methods by which complaints concerning such rates, charges, or collection practices will be resolved;

(D) ensure, by contract or tariff, that each aggregator for which such provider is the presubscribed provider of operator services is in compliance with the requirements of subsection (c) of this section and, if applicable, subsection (e)(1) of this section;

(E) withhold payment (on a location-by-location basis) of any compensation, including commissions, to aggregators if such provider reasonably believes that the aggregator (i) is blocking access by means of "950" or "800" numbers to interstate common carriers in violation of subsection (c)(1)(B) of this section or (ii) is blocking access to equal access codes in violation of rules the Commission may prescribe under subsection (e)(1) of this section;

(F) not bill for unanswered telephone calls in areas where equal access is available;

(G) not knowingly bill for unanswered telephone calls where equal access is not available;

(H) not engage in call splashing, unless the consumer requests to be transferred to another provider of operator services, the consumer is informed prior to incurring any charges that the rates for the call may not reflect the rates from the actual originating location of the call, and the consumer then consents to be transferred; and

(I) except as provided in subparagraph (H), not bill for a call that does not reflect the location of the origination of the call.

(2) Additional requirements for first 3 years

In addition to meeting the requirements of paragraph (1), during the 3-year period beginning on the date that is 90 days after October 17, 1990, each presubscribed provider of operator services shall identify itself audibly and distinctly to the consumer, not only as required in paragraph (1)(A), but also for a second time before connecting the call and before the consumer incurs any charge.

(c) Requirements for aggregators

(1) In general

Each aggregator, beginning not later than 90 days after October 17, 1990, shall—

(A) post on or near the telephone instrument, in plain view of consumers—

(i) the name, address, and toll-free telephone number of the provider of operator services;

(ii) a written disclosure that the rates for all operator-assisted calls are available on request, and that consumers have a right to obtain access to the interstate common carrier of their choice and may contact their preferred interstate common carriers for information on accessing that carrier's service using that telephone; and

(iii) the name and address of the enforcement division of the Common Carrier Bureau of the Commission, to which the consumer may direct complaints regarding operator services;

(B) ensure that each of its telephones presubscribed to a provider of operator services allows the consumer to use "800" and "950" access code numbers to obtain access to the provider of operator services desired by the consumer; and

(C) ensure that no charge by the aggregator to the consumer for using an "800" or "950" access code number, or any other access code number, is greater than the amount the aggregator charges for calls placed using the presubscribed provider of operator services.

(2) Effect of State law or regulation

The requirements of paragraph (1)(A) shall not apply to an aggregator in any case in which State law or State regulation requires the aggregator to take actions that are substantially the same as those required in paragraph (1)(A).

(d) General rulemaking required

(1) Rulemaking proceeding

The Commission shall conduct a rulemaking proceeding pursuant to this subchapter to prescribe regulations to—

(A) protect consumers from unfair and deceptive practices relating to their use of operator services to place interstate telephone calls; and

(B) ensure that consumers have the opportunity to make informed choices in making such calls.

(2) Deadlines

The Commission shall initiate the proceeding required under paragraph (1) within 60 days after October 17, 1990, and shall prescribe regulations pursuant to the proceeding not later than 210 days after October 17, 1990. Such regulations shall take effect not later than 45 days after the date the regulations are prescribed.

(3) Contents of regulations

The regulations prescribed under this section shall—

(A) contain provisions to implement each of the requirements of this section, other than the requirements established by the rulemaking under subsection (e) of this section on access and compensation; and

(B) contain such other provisions as the Commission determines necessary to carry out this section and the purposes and policies of this section.

(4) Additional requirements to be implemented by regulations

The regulations prescribed under this section shall, at a minimum—

(A) establish minimum standards for providers of operator services and aggregators to use in the routing and handling of emergency telephone calls; and

(B) establish a policy for requiring providers of operator services to make public information about recent changes in operator services and choices available to consumers in that market.

(e) Separate rulemaking on access and compensation

(1) Access

The Commission, within 9 months after October 17, 1990, shall require—

(A) that each aggregator ensure within a reasonable time that each of its telephones presubscribed to a provider of operator services allows the consumer to obtain access to the provider of operator services desired by the consumer through the use of an equal access code; or

(B) that all providers of operator services, within a reasonable time, make available to their customers a "950" or "800" access code number for use in making operator services calls from anywhere in the United States; or

(C) that the requirements described under both subparagraphs (A) and (B) apply.

(2) Compensation

The Commission shall consider the need to prescribe compensation (other than advance payment by consumers) for owners of competitive public pay telephones for calls routed to providers of operator services that are other than the presubscribed provider of operator services for such telephones. Within 9 months after October 17, 1990, the Commission shall reach a final decision on whether to prescribe such compensation.

(f) Technological capability of equipment

Any equipment and software manufactured or imported more than 18 months after October 17, 1990, and installed by any aggregator shall be technologically capable of providing consumers with access to interstate providers of operator services through the use of equal access codes.

(g) Fraud

In any proceeding to carry out the provisions of this section, the Commission shall require such actions or measures as are necessary to ensure that aggregators are not exposed to undue risk of fraud.

(h) Determinations of rate compliance

(1) Filing of informational tariff

(A) In general

Each provider of operator services shall file, within 90 days after October 17, 1990, and shall maintain, update regularly, and keep open for public inspection, an informational tariff specifying rates, terms, and conditions, and including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator services are provided. Any changes in such rates, terms, or conditions shall be filed no later than the first day on which the changed rates, terms, or conditions are in effect.

(B) Waiver authority

The Commission may, after 4 years following October 17, 1990, waive the requirements of this paragraph only if—

(i) the findings and conclusions of the Commission in the final report issued under paragraph (3)(B)(iii) state that the regulatory objectives specified in subsection (d)(1)(A) and (B) of this section have been achieved; and

(ii) the Commission determines that such waiver will not adversely affect the continued achievement of such regulatory objectives.

(2) Review of informational tariffs

If the rates and charges filed by any provider of operator services under paragraph (1) appear upon review by the Commission to be unjust or unreasonable, the Commission may require such provider of operator services to do either or both of the following:

(A) demonstrate that its rates and charges are just and reasonable, and

(B) announce that its rates are available on request at the beginning of each call.

(3) Proceeding required

(A) In general

Within 60 days after October 17, 1990, the Commission shall initiate a proceeding to determine whether the regulatory objectives specified in subsection (d)(1)(A) and (B) of this section are being achieved. The proceeding shall—

(i) monitor operator service rates;

(ii) determine the extent to which offerings made by providers of operator services are improvements, in terms of service quality, price, innovation, and other factors, over those available before the entry of new providers of operator services into the market;

(iii) report on (in the aggregate and by individual provider) operator service rates, incidence of service complaints, and service offerings;

(iv) consider the effect that commissions and surcharges, billing and validation costs, and other costs of doing business have on the overall rates charged to consumers; and

(v) monitor compliance with the provisions of this section, including the periodic placement of telephone calls from aggregator locations.

(B) Reports

(i) The Commission shall, during the pendency of such proceeding and not later than 5 months after its

commencement, provide the Congress with an interim report on the Commission's activities and progress to date.

(ii) Not later than 11 months after the commencement of such proceeding, the Commission shall report to the Congress on its interim findings as a result of the proceeding.

(iii) Not later than 23 months after the commencement of such proceeding, the Commission shall submit a final report to the Congress on its findings and conclusions.

(4) Implementing regulations

(A) In general

Unless the Commission makes the determination described in subparagraph (B), the Commission shall, within 180 days after submission of the report required under paragraph (3)(B)(iii), complete a rulemaking proceeding pursuant to this subchapter to establish regulations for implementing the requirements of this subchapter (and paragraphs (1) and (2) of this subsection) that rates and charges for operator services be just and reasonable. Such regulations shall include limitations on the amount of commissions or any other compensation given to aggregators by providers of operator service.

(B) Limitation

The requirement of subparagraph (A) shall not apply if, on the basis of the proceeding under paragraph (3)(A), the Commission makes (and includes in the report required by paragraph (3)(B)(iii)) a factual determination that market forces are securing rates and charges that are just and reasonable, as evidenced by rate levels, costs, complaints, service quality, and other relevant factors.

(i) Statutory construction

Nothing in this section shall be construed to alter the obligations, powers, or duties of common carriers or the Commission under the other sections of this chapter.

47 U.S.C. § 332

§ 332. Mobile services

(a) Factors which Commission must consider

In taking actions to manage the spectrum to be made available for use by the private mobile services, the Commission shall consider, consistent with section 151 of this title, whether such actions will—

(1) promote the safety of life and property;

(2) improve the efficiency of spectrum use and reduce the regulatory burden upon spectrum users, based upon sound engineering principles, user operational requirements, and market-place demands;

(3) encourage competition and provide services to the largest feasible number of users; or

(4) increase interservice sharing opportunities between private mobile services and other services.

(b) Advisory coordinating committees

(1) The Commission, in coordinating the assignment of frequencies to stations in the private mobile services and in the fixed services (as defined by the Commission by rule), shall have authority to utilize assistance furnished by advisory coordinating committees consisting of individuals who are not officers or employees of the Federal Government.

(2) The authority of the Commission established in this subsection shall not be subject to or affected by the provisions of part III of Title 5 or section 1342 of Title 31.

(3) Any person who provides assistance to the Commission under this subsection shall not be considered, by reason of having provided such assistance, a Federal employee.

(4) Any advisory coordinating committee which furnishes assistance to the Commission under this subsection shall not be subject to the provisions of the Federal Advisory Committee Act.

(c) Regulatory treatment of mobile services

(1) Common carrier treatment of commercial mobile services

(A) A person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier for purposes of this chapter, except for such provisions of subchapter II of this chapter as the Commission may specify by regulation as inapplicable to that service or person. In prescribing or amending any such regulation, the Commission may not specify any provision of section 201, 202, or 208 of this title, and may specify any other provision only if the Commission determines that—

(i) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory;

(ii) enforcement of such provision is not necessary for the protection of consumers; and

(iii) specifying such provision is consistent with the public interest.

(B) Upon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of section 201 of this title. Except to the extent that the Commission is required to respond to such a request, this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to this chapter.

(C) The Commission shall review competitive market conditions with respect to commercial mobile services and shall include in its annual report an analysis of those conditions. Such analysis shall include an identification of the number of competitors in various commercial mobile services, an analysis of whether or not

there is effective competition, an analysis of whether any of such competitors have a dominant share of the market for such services, and a statement of whether additional providers or classes of providers in those services would be likely to enhance competition. As a part of making a determination with respect to the public interest under subparagraph (A)(iii), the Commission shall consider whether the proposed regulation (or amendment thereof) will promote competitive market conditions, including the extent to which such regulation (or amendment) will enhance competition among providers of commercial mobile services. If the Commission determines that such regulation (or amendment) will promote competition among providers of commercial mobile services, such determination may be the basis for a Commission finding that such regulation (or amendment) is in the public interest.

(D) The Commission shall, not later than 180 days after August 10, 1993, complete a rulemaking required to implement this paragraph with respect to the licensing of personal communications services, including making any determinations required by subparagraph (C).

(2) Non-common carrier treatment of private mobile services

A person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this chapter. A common carrier (other than a person that was treated as a provider of a private land mobile service prior to the enactment of the Omnibus Budget Reconciliation Act of 1993) shall not provide any dispatch service on any frequency allocated for common carrier service, except to the extent such dispatch service is provided on stations licensed in the domestic public land mobile radio service before January 1, 1982. The Commission may by regulation terminate, in whole or in part, the prohibition con-

tained in the preceding sentence if the Commission determines that such termination will serve the public interest.

(3) State preemption

(A) Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates. Notwithstanding the first sentence of this subparagraph, a State may petition the Commission for authority to regulate the rates for any commercial mobile service and the Commission shall grant such petition if such State demonstrates that—

(i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or

(ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.

The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition. If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such periods of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory.

(B) If a State has in effect on June 1, 1993, any regulation concerning the rates for any commercial mobile service offered in such State on such date, such State may, no later than 1 year after August 10, 1993, petition the Commission requesting that the State be authorized to continue exercising authority over such rates. If a State files such a petition, the State's existing regulation shall, notwithstanding subparagraph (A), remain in effect until the Commission completes all action (including any reconsideration) on such petition. The Commission shall review such petition in accordance with the procedures established in such subparagraph, shall complete all action (including any reconsideration) within 12 months after such petition is filed, and shall grant such petition if the State satisfies the showing required under subparagraph (A)(i) or (A)(ii). If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such period of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory. After a reasonable period of time, as determined by the Commission, has elapsed from the issuance of an order under subparagraph (A) or this subparagraph, any interested party may petition the Commission for an order that the exercise of authority by a State pursuant to such subparagraph is no longer necessary to ensure that the rates for commercial mobile services are just and reasonable and not unjustly or unreasonably discriminatory. The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition in whole or in part.

(4) Regulatory treatment of communications satellite corporation

Nothing in this subsection shall be construed to alter or affect the regulatory treatment required by title IV of the Communica-

tions Satellite Act of 1962 [47 U.S.C. § 741 et seq.] of the corporation authorized by title III of such Act [47 U.S.C. § 731 et seq.].

(5) Space segment capacity

Nothing in this section shall prohibit the Commission from continuing to determine whether the provision of space segment capacity by satellite systems to providers of commercial mobile services shall be treated as common carriage.

(6) Foreign ownership

The Commission, upon a petition for waiver filed within 6 months after August 10, 1993, may waive the application of section 310(b) of this title to any foreign ownership that lawfully existed before May 24, 1993, of any provider of a private land mobile service that will be treated as a common carrier as a result of the enactment of the Omnibus Budget Reconciliation Act of 1993, but only upon the following conditions:

(A) The extent of foreign ownership interest shall not be increased above the extent which existed on May 24, 1993.

(B) Such waiver shall not permit the subsequent transfer of ownership to any other person in violation of section 310(b) of this title.

(d) Definitions

For purposes of this section—

(1) the term "commercial mobile service" means any mobile service (as defined in section 153(n) of this title) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission;

(2) the term "interconnected service" means service that is interconnected with the public switched network (as such terms are defined by regulation by the Commission) or service for which a request for interconnection is pending pursuant to subsection (c)(1)(B) of this section; and

(3) the term "private mobile service" means any mobile service (as defined in section 153(n) of this title) that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission.

EXCERPTS FROM SECTION 6 OF THE INTERSTATE COMMERCE ACT AS IT STOOD IN 1934

49 U.S.C. § 6(1), 6(3), 6(7) (1934)

§ 6. Schedules and statements of rates, etc., joint rail and water transportation.

(1) Schedule of rates, fares, and charges; filing and posting.

Every common carrier subject to the provisions of this chapter shall file with the commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print, and keep open to public inspection, as aforesaid, the separately established rates, fares, and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require, all privileges or facilities granted or allowed, and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such

aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this chapter.

* * * *

(3) Change in rates, fares, etc.; notice required; simplification of schedules.

No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: *Provided*, That the commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions: *Provided further*, That the commission is authorized to make suitable rules and regulations for the simplification of schedules of rates, fares, charges, and classifications and to permit in such rules and regulations the filing of an amendment of or change in any rate, fare, charge, or classification without

filing complete schedules covering rates, fares, charges, or classifications not changed if, in its judgment, not inconsistent with the public interest.

* * * *

(7) Transportation without filing and publishing rates forbidden; rebates; privileges.

No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

EXCERPTS FROM THE INTERSTATE COMMERCE ACT AS RECODIFIED IN 1978

49 U.S.C. § 10761

§ 10761. Transportation prohibited without tariff

(a) Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect

under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

(b) The Commission may grant relief from subsection (a) of this section to contract carriers when relief is consistent with the public interest and the transportation policy of section 10101 of this title. The Commission may begin a proceeding under this subsection on application of a contract carrier or group of contract carriers and on its own initiative for a water contract carrier or group of water contract carriers.

(c) This section shall not apply to expenses authorized under section 10751 of this title.

49 U.S.C. § 10762

§ 10762. General tariff requirements

(a)(1) A carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title (except a motor common carrier) shall publish and file with the Commission tariffs containing the rates and (A) if a common carrier, classifications, rules, and practices related to those rates, and (B) if a contract carrier, rules and practices related to those rates, established under this chapter for transportation or service it may provide under this subtitle. A motor common carrier shall publish and file with the Commission tariffs containing the rates for transportation it may provide under this subtitle. The Commission may prescribe other information that motor common carriers shall include in their tariffs. A motor contract carrier that serves only one shipper and has provided continuous transportation to that shipper for at least one

year or a motor carrier of property providing transportation under a certificate to which the provisions of section 10922(b)(4)(E) of this title apply or under a permit to which the provisions of section 10923(b)(5) of this title apply may file only its minimum rates unless the Commission finds that filing of actual rates is required in the public interest.

(2) Carriers that publish tariffs under paragraph (1) of this subsection shall keep them open for public inspection. A rate contained in a tariff filed by a common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II, III, or IV of chapter 105 shall be stated in money of the United States. A tariff filed by a motor or water contract carrier or by a household goods freight forwarder providing transportation or service subject to the jurisdiction of the Commission under subchapter II, III, and IV of that chapter, respectively, may not become effective for 30 days after it is filed.

(b)(1) The Commission shall prescribe the form and manner of publishing, filing, and keeping tariffs open for public inspection under this section. The Commission may prescribe specific charges to be identified in a tariff published by a common carrier providing transportation or service subject to its jurisdiction under subchapter I, III, or IV of that chapter, but those tariffs must identify plainly—

(A) the places between which property and passengers will be transported;

(B) terminal, storage, and icing charges (stated separately) if a carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of that chapter;

(C) terminal charges if a common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter III or IV of that chapter;

(D) privileges given and facilities allowed; and

(E) any rules that change, affect, or determine any part of the published rate.

(2) A joint tariff filed by a carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of that chapter shall identify the carriers that are parties to it. The carriers that are parties to a joint tariff, other than the carrier filing it, must file a concurrence or acceptance of the tariff with the Commission but are not required to file a copy of the tariff. The Commission may prescribe or approve what constitutes a concurrence or acceptance.

(c)(1) When a common carrier providing transportation or service subject to the jurisdiction of the Commission (A) under subchapter I of chapter 105 of this title proposes to change a rate, or (B) under another subchapter of that chapter proposes to change a rate, classification, rule, or practice, the carrier shall publish, file, and keep open for public inspection a notice of the proposed change as required under subsections (a) and (b) of this section.

(2) When a contract carrier providing transportation subject to the jurisdiction of the Commission under subchapter II or III of chapter 105 of this title proposes to establish a new rate or to reduce a rate, directly or by changing a rule or practice related to the rate or the value of service under the rate, the carrier shall publish, file, and keep open for public inspection a notice of the new or reduced rate as required under subsections (a) and (b) of this section.

(3) A notice filed under this subsection shall plainly identify the proposed change or new or reduced rate and indicate its proposed effective date. In the case of a carrier other than a rail carrier and motor common carrier of passengers with respect to special or charter transportation, a proposed rate change or a new or reduced rate may not become effective for 30 days after the notice is published, filed, and held open as required under subsections (a) and (b) of this section. In the case of a rail carrier, a proposed rate change resulting in an increased rate or a new rate shall not

become effective for 20 days after the notice is published and a proposed rate change resulting in a reduced rate shall not become effective for 10 days after the notice is published, except that a contract authorized under section 10713 of this title shall become effective in accordance with the provisions of such section. In the case of a motor common carrier of passengers, a proposed rate change resulting in an increased rate or a new rate applicable to special or charter transportation shall not become effective for 30 days after the notice is published, and a proposed rate change resulting in a reduced rate applicable to special or charter transportation shall not become effective for 10 days after the notice is published.

(d)(1) The Commission may reduce the notice period of subsections (a) and (c) of this section if cause exists. The Commission may change the other requirements of this section if cause exists in particular instances or as they apply to special circumstances.

(2) The Commission may prescribe regulations for the simplification of tariffs by carriers providing transportation subject to its jurisdiction under subchapter I of chapter 105 of this title and permit them to change rates, classifications, rules, and practices without filing complete tariffs that cover matter that is not being changed when the Commission finds that action to be consistent with the public interest. Those carriers may publish new tariffs that incorporate changes or plainly indicate the proposed changes in the tariffs then in effect and kept open for public inspection. However, the Commission shall require that all rates of rail carriers and rail rate-making associations be incorporated in their individual tariffs by the end of the 2d year after initial publication of the rate, or by the end of the 2d year after a change in a rate becomes effective, whichever is later. The Commission may extend those periods if cause exists, but if it does, it must send a notice of the extension and a statement of the reasons for the extension to Congress. A rate not incorporated in an individual tariff as required by the Commission is void.

(e) The Commission may reject a tariff submitted to it by a common carrier under this section if that tariff violates this section or regulation of the Commission carrying out this section.

(f) The Commission may grant relief from this section to contract carriers when relief is consistent with the public interest and the transportation policy of section 10101 of this title. The Commission may begin a proceeding under this subsection on application of a contract carrier or group of contract carriers and on its own initiative for a water contract carrier or group of water contract carriers.

(g) The Commission shall streamline and simplify, to the maximum extent practicable, the filing requirements applicable under this section to motor common carriers of property with respect to transportation provided under certificates to which the provisions of section 10922(b)(4)(E) of this title apply and to motor contract carriers of property with respect to transportation provided under permits to which the provisions of section 10923(b)(5) of this title apply.